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Supreme Court of the United States

OCTOBER TERM, 2002

IN RE FEDERAL-MOGUL GLOBAL, INC.

DAIMLERCHRYSLER CORPORATION,
FORD MOTOR COMPANY, AND
GENERAL MOTORS CORPORATION,

Petitioners.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Third Circuit erred, and created a circuit conflict, by holding that an order denying a bankruptcy transfer motion under 28 U.S.C. § 157(b)(5) is not appealable.

2. Whether the Third Circuit erred, and created circuit conflicts, by holding that an order remanding claims directly to state courts across jurisdictional lines for lack of bankruptcy jurisdiction is not appealable.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, petitioners hereby state as follows:

DaimlerChrysler Corporation is wholly owned by DaimlerChrysler North America Holding Corporation, which in turn is wholly owned by DaimlerChrysler AG.

Ford Motor Company has no parent corporation and no publicly held company owns 10% or more of its stock.

General Motors Corporation has no parent corporation and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

This is a case about jurisdiction—both appellate and bankruptcy—but it is also a case about whether the American judicial system can address the exploding national asbestos litigation crisis with even a modicum of fairness and rationality. In recent years, the system has been engulfed by a tidal wave of new asbestos claims targeted against not only asbestos manufacturers, but any and all companies that incorporated products containing asbestos into their own products. The latter group includes petitioners, the Nation's three largest automobile manufacturers, which for a number of years incorporated brake pads and other friction products containing encapsulated asbestos into their vehicles. Although epidemiological studies have unanimously rejected the notion that exposure to automotive friction products can cause disease, petitioners have now been named as defendants in thousands of individual asbestos lawsuits in the courts of virtually every State of the Union.

Last fall, this new wave of asbestos litigation swept Federal-Mogul Global Inc., an automotive-parts supplier, into bankruptcy. Because petitioners had bought friction products from businesses owned by Federal-Mogul, they removed these claims to federal court as "related to" the Federal-Mogul bankruptcy, and sought a global determination of whether the expert opinions underlying the friction-product claims pass scientific muster under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). After provisionally transferring these thousands of removed claims to itself, the district court below ultimately decided that it lacked bankruptcy jurisdiction over the claims, and the Third Circuit in turn decided that it lacked appellate jurisdiction over that decision. Absent review by this Court, accordingly, the American judicial system will lose its only opportunity to dispose of thousands of meritless and docket-clogging asbestos claims in one fell swoop without *any appellate review* of the underlying jurisdictional issue.

This case warrants this Court's review, however, not only because of its signal practical significance, but also because the

decision below is manifestly incorrect and squarely conflicts with decisions from other courts of appeals. The district court below announced two different (and inconsistent) dispositions of the claims: in the single order under review, it purported not only (1) to deny petitioners' motion to transfer the claims to itself from the federal courts *to* which they had been removed (which would leave the claims in those other federal courts), but also (2) to remand those claims directly to the state courts *from* which they had been removed (which would leave the claims in those state courts). Notwithstanding the logical impossibility of that outcome, the Third Circuit held that the order was immune from appellate review *regardless* of whether construed as the denial of a transfer motion or as the grant of a remand motion. On both scores, the Third Circuit erred and created circuit conflicts.

Construing the order as the denial of a transfer motion, the Third Circuit simply recited and relied on the general rule that such orders are not appealable because they are not "final." As then-Judge Breyer explained, however, courts have long applied a relaxed standard of finality in the bankruptcy context, because it makes no sense to postpone review of any and all discrete orders for years until confirmation of a final plan of reorganization. *See In re Saco Local Dev. Corp.*, 711 F.2d 441, 442-46 (1st Cir. 1983). And the Sixth Circuit has applied that principle specifically to hold that an order denying a motion to transfer claims under 28 U.S.C. § 157(b)(5)—the very motion at issue here—is appealable as both a "final" and a "collateral" order. *See In re Dow Corning Corp.*, 86 F.3d 482, 487-88 (6th Cir. 1996). That decision makes sense: by denying such a motion, the district court has conclusively determined that the relevant claims are not "related to" the bankruptcy, and that determination is effectively unreviewable when (years later) a final reorganization plan is confirmed. Because the decision below is wrong, and squarely conflicts with the Sixth Circuit's ruling in *Dow Corning*, this Court's review is warranted.

Alternatively construing the order as the grant of a remand motion, the Third Circuit recited and relied on the general rule that remand orders are unappealable. As this Court has explained, however, that rule does not apply to remand orders beyond the district court's statutory authority, *see Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 351 (1976)—like the remand orders here, which purported to remand bankruptcy-related claims removed to other federal courts directly to state courts across jurisdictional lines. The Third Circuit, however, held that *Thermtron* simply did not apply to remand orders based on a lack of subject matter jurisdiction *even if* those orders were beyond the district court's statutory authority—a holding that is not only erroneous but inconsistent with the law of at least four other circuits. And the Third Circuit then compounded its error by proceeding to hold that the district court below *was* authorized to "remand" transferred bankruptcy claims directly to state courts across jurisdictional lines. That holding conflicts not only with the plain language of the bankruptcy remand statute—which authorizes a remand only by "*[t]he court to which [a bankruptcy] claim . . . is removed*," 28 U.S.C. § 1452(b) (emphasis added), but also with the Ninth Circuit's decision in *Hudson-Ram L.P. v. Archer*, 210 F.3d 387, 2000 WL 14398 (9th Cir. Jan. 7, 2000) (unpublished), applying that plain language in precisely these circumstances. Because the decision below is wrong, and squarely conflicts with rulings from other circuits, this Court's review is warranted on this score too.

In evaluating these appellate jurisdictional issues, it is important not to lose sight of the bigger picture presented here. The underlying issue whether the district court below has jurisdiction to resolve thousands of asbestos friction-product claims in one fell swoop through a global *Daubert* hearing is an immensely important legal issue in the context of bankruptcy jurisdiction and an immensely important practical issue in the context of the national asbestos litigation crisis. The Third Circuit pointedly declined to decide whether the

district court had erred by rejecting jurisdiction over these claims; rather, the Third Circuit decided only that any error was not so unmistakably clear as to warrant the extraordinary remedy of mandamus. Because the Third Circuit based its decision on the mandamus standard, the question whether that court erred by declining appellate jurisdiction is critically important. Accordingly, this Court's review of the (independently certworthy) appellate jurisdiction questions is warranted, so that the important underlying issues are not resolved by default without appellate review.

OPINIONS BELOW

The Third Circuit's opinion is reported at 300 F.3d 368 and reprinted in the Appendix ("App.") at 1a-42a. The district court's unreported order purporting to deny petitioners' transfer motion and remand the claims is reprinted at App. 56a-57a, and the district court's subsequent opinion relating to that order is reported at 282 B.R. 301 and reprinted at App. 58a-85a.

JURISDICTION

The Third Circuit entered judgment on July 31, 2002. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

The final-judgment statute, in relevant part, provides:

> The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . .

28 U.S.C. § 1291.

The general federal removal statute provides:

> Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the

> defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

28 U.S.C. § 1441(a).

The general federal remand statute, in relevant part, provides:

> (c) . . . If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. . . . A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.
>
> (d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, [except for certain civil rights cases].

28 U.S.C. §§ 1447(c), (d).

The bankruptcy removal statute provides:

> A party may remove any claim or cause of action in a civil action . . . to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

28 U.S.C. § 1452(a).

The bankruptcy remand statute provides:

> The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.

28 U.S.C. § 1452(b).

STATEMENT OF THE CASE

This case arises against the backdrop of a national asbestos litigation crisis that has only intensified, rather than abated, in recent years. As the major asbestos manufacturers have gone bankrupt, and as bankruptcy trusts have begun to dwindle, claims are increasingly being brought against companies that never manufactured asbestos, but only used asbestos-containing materials in their products or operations. "[A]s one defendant has followed another into chapter 11, plaintiff attorneys have turned to other defendants to substitute for those in bankruptcy (against whom litigation is stayed) and have increased their financial demands on these defendants." Rand Institute, *Asbestos Litigation in the U.S.: A New Look at an Old Issue* 25 (Aug. 2001). Indeed, it is estimated that "[n]ontraditional defendants now account for over 60% of asbestos expenditures," *id.* at 10, and current asbestos litigation has been characterized as "The Search for the Solvent Bystander," Roger Parloff, *The $200 Billion Miscarriage Of Justice,* Fortune, March 4, 2002, at 162.

Thus, although the incidence of asbestos-related disease has declined markedly over the three decades since the government enacted strict regulations governing asbestos use in 1971, *see* National Cancer Institute, *SEER Data*, available at www-seer.ims.nci.nih.gov, there has been a dramatic upsurge of asbestos claims filed in recent years, *see* Rand Institute, *Asbestos Litigation,* at 6, 13; Richard B. Schmitt, *Burning Issue: How Plaintiffs' Lawyers Have Turned Asbestos Into a Court Perennial*, Wall St. J., Mar. 5, 2001 ("A generation ago, some experts predicted that asbestos suits would be tailing off by now. But the pace is only picking up.").[1] Many of the

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[1] "It has been 20 to 30 years since most asbestos-containing products were phased out of production completely. As a result, instances of serious asbestosis began declining many years ago. The 1994 edition of the medical text Occupational Lung Disorders describes asbestosis as a 'disappearing disease.' But while asbestosis may be disappearing from America's

(continued...)

plaintiffs filing these new claims have neither "incurred any medical expenses [nor] ever lost a day of work due to asbestos exposure." Parloff, *$200 Billion Miscarriage*, at 155; *id.* at 156 (noting that "[a]lmost all of th[e] surge [in asbestos claims] occurred among claimants alleging nonmalignant asbestos-related conditions . . .—the most subjective and least serious diagnoses."). The impact on the American economy, however, has been substantial: in the past two years alone, at least ten major companies (Babcock & Wilcox, Pittsburgh Corning, Owens Corning, Burns & Roe, Armstrong World Industries, G-I Holdings, W.R. Grace, USG, U.S. Mineral, and Federal-Mogul) have been forced into bankruptcy by asbestos claims. As *Fortune* magazine recently reported, "[t]otal corporate asbestos liability to U.S. plaintiffs is now expected to reach $200 billion," and "though as recently as 15 years ago dispassionate experts predicted that a total of 100,000 people might eventually file asbestos-related claims, the most recent forecasts predict between 1.3 million and 3.1 million claims, of which only about 570,000 have yet been filed." *Id.* at 155-56.

Indeed, so overwhelming was this tidal wave of asbestos litigation last year that Federal-Mogul alone was engulfed by over *59,000* such claims—"mainly involving friction products," such as brake pads—during the first six months of 2001 alone. Federal-Mogul Form 10-Q, at 10 (Aug. 1, 2001). Federal-Mogul estimated its liability for such claims at approximately $236 million. *See id.* at 11. These claims stemmed primarily from Federal-Mogul's purchase of two businesses, Abex and Wagner, that had manufactured automotive friction products containing asbestos. In light of its asbestos liability, Federal-Mogul filed for chapter 11 reorganization in the U.S. District Court for the District of Delaware in October 2001. Chief Judge Becker of the Third

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[1] (...continued)
hospitals, it is precipitously on the rise in America's courthouses, with the rate of new filings against some defendants having nearly tripled in the past two years." Parloff, *$200 Billion Miscarriage,* at 156.

Circuit thereafter appointed Judge Alfred M. Wolin, of the District of New Jersey, to sit by designation in Delaware to handle the Federal-Mogul bankruptcy and several other asbestos-related bankruptcies: "[I]t is my considered judgment that these bankruptcy cases, which carry with them tens of thousands [of] asbestos claims, need to be consolidated before a single judge so that a coordinated plan for management can be developed and implemented." App. 47a.

Federal-Mogul, however, was far from the only company hit with asbestos claims alleging injury from exposure to automotive friction products. To the contrary, petitioners DaimlerChrysler Corporation, Ford Motor Company, and General Motors Corporation—which over the years had purchased brake pads containing encapsulated asbestos from Abex and Wagner, and installed those products in their vehicles—were also named as defendants in thousands of asbestos lawsuits filed last year, almost exclusively in state courts. Most of these lawsuits named as defendants both one or more of petitioners and one or more of Federal-Mogul's friction-product businesses; indeed, a standard plaintiffs' asbestos complaint now indiscriminately names over one hundred defendants. *See, e.g.*, C.A. App. 807-09 (standard asbestos complaint naming 110 defendants, including Chrysler Corp., Ford Motor Co., and Moog Automotive Products Co. f/k/a Wagner Electric Corp.).

After Federal-Mogul filed for bankruptcy, petitioners began removing thousands of asbestos friction-product claims against them from state to federal court under 28 U.S.C. § 1452(b) as "related to" the Federal-Mogul bankruptcy under 28 U.S.C. § 1334(b). (The removal of these claims did not remove the entire underlying cases from state court, because the bankruptcy removal statute (unlike the general federal removal statute) specifically authorizes the removal of "claims," as opposed to entire "civil actions." *Compare* 28 U.S.C. § 1452(a) (bankruptcy removal statute) *with* 28 U.S.C. § 1441 (general removal statute)). Petitioners filed a motion to

transfer all the removed friction-product claims to the Delaware district court under 28 U.S.C. § 157(b)(5), which authorizes "the district court in which the bankruptcy case is pending" to transfer "personal injury tort and wrongful death claims" to itself. As petitioners explained, such a transfer would allow a global, uniform resolution of "the core issue of whether brakes and other automotive parts cause the diseases claimed," and would "prevent an untenable free-for-all, where plaintiffs will request numerous district courts around the country to remand the removed actions to state courts." C.A. App. 474-75.

Plaintiffs responded by filing more than a thousand remand motions in federal district courts across the country. Almost immediately, district courts in the Southern District of Texas (Kent, J.), and the Southern District of West Virginia (Haden, J.), granted the motions with respect to the claims before them. *See Clamon v. Kellogg-Brown & Root, Inc.*, No. G-01-784 (S.D. Tex. Dec. 6, 2001) (one of 19 orders); *In re Asbestos Litig.*, 271 B.R. 118 (S.D. W. Va. Dec. 7, 2001).

On December 10, 2001, the Delaware district court entered an order provisionally transferring to itself the "Friction Product Claims" against petitioners, which the court referred to as claims "arising out of so-called 'friction products' as to which [petitioners] contend they have a right of indemnification against the debtors." App. 49a. The purpose of that order, the court explained, was "to preserve the *status quo* pending a plenary hearing and determination by the Court of the Transfer Motion." *Id.* Only thus, the court recognized, could the jurisdictional issues raised by these claims be resolved in a global, uniform manner, preventing a crazy-quilt of conflicting decisions by scores of district courts around the country. On January 3, 2002, the Delaware court clarified the scope of its December 10 order by explaining that friction product claims against petitioners removed *after* December 10 were also provisionally transferred to itself. App. 51a-55a.

Notwithstanding the provisional transfer order, plaintiffs *continued* to file and pursue remand motions in district courts across the country. C.A. App. 636-44. Many of these motions explicitly urged these other courts to ignore the Delaware court's transfer order. *See, e.g.,* Pls.' Resp. to Notice of Order Provisionally Transferring Friction Product Claims, *Noble v. E.H. O'Neil Co.*, No. 1:01CCV391GR, at 7 (S.D. Miss. Dec. 28, 2001), C.A. App. 896 ("[T]he Big Three's claim that this Court is without jurisdiction over this case is incorrect and should therefore be *ignored* by this Court in its disposition of this case. . . . Plaintiffs urge this Court to *disregard* the Notice [of Provisional Transfer Order and] continue to exercise its exclusive authority and jurisdiction over the removal and remand proceedings.") (emphasis added). Not surprisingly, most courts denied such motions on the ground that the provisional transfer order had divested them of jurisdiction over the claims. *See* C.A. App. 900-73.

Notwithstanding the provisional transfer order, however, district courts in Texas and Illinois granted remand motions in January 2002. *See Dunn v. DaimlerChrysler Corp.*, No. 3:01-CV-2870-X (N.D. Tex. Jan. 3, 2002); *Adams v. General Motors Corp.*, No. 01-794-GPM (S.D. Ill. Jan. 29, 2002). Petitioners sought mandamus from the Fifth and Seventh Circuits on the ground that those courts had no authority to remand claims that had been provisionally transferred to Delaware.

On Friday, February 8, 2002, the Delaware court held a hearing on petitioners' transfer motions, and entered an order denying those motions on the ground that "this Court lacks subject matter jurisdiction over the Friction Products Claims." App. 57a. Notwithstanding its denial of the transfer motions, the court then purported to remand those very same claims directly "to the state courts from which they were removed" all across the country pursuant to 28 U.S.C. §§ 1447 and 1452. *Id.* The district court followed up its order with a written opinion on February 15, 2002. App. 58a-85a.

Meanwhile, on Monday, February 11, 2002, petitioners filed a notice of appeal from the February 8 order, and sought an emergency stay pending appeal. That afternoon, the Third Circuit (per Scirica, J.) granted a temporary stay "in order for the Court to receive responses to the motion from opposing counsel and for full consideration of the matter by a three judge panel." C.A. App. 53. The Third Circuit subsequently extended that stay to all appellants, and kept it in place pending a decision by the merits panel. C.A. App. 54, 56.

Subsequently, both the Fifth and Seventh Circuits granted petitioners' mandamus petitions. *In re General Motors Corp.*, No. 02-1273 (7th Cir. Feb. 15, 2002), App. 86a-88a; *In re DaimlerChrysler Corp.*, No. 02-10029 (5th Cir. Mar. 8, 2002), App. 89a-93a. As those courts explained, the provisional transfer order had transferred to Delaware all friction-product claims against petitioners pending in federal courts on or after December 10, 2001, and hence divested all other federal courts of jurisdiction over those claims, and the Third Circuit stay had prevented the Delaware court's February 8 order from taking effect. App. 87a, 92a-93a & n.3.

Notwithstanding the Third Circuit stay and the Fifth and Seventh Circuit mandamus orders, plaintiffs *continued* to file remand motions in district courts across the country. In May 2002, the district court in Galveston, Texas (Kent, J.) granted several such motions without addressing either the Third Circuit stay or the Fifth and Seventh Circuit mandamus orders. Petitioners once again sought mandamus. The Fifth Circuit not only granted the writ, but removed Judge Kent from all pending and future asbestos friction-product claims against petitioners. *In re DaimlerChrysler Corp.*, 294 F.3d 697 (5th Cir. 2002).

On July 31, 2002, however, the Third Circuit ruled that it lacked appellate jurisdiction to review the Delaware court's order, and dismissed petitioners' appeal. App. 1a-42a. The court noted that "[w]e are neither unaware of nor unsympathetic to the argument of [petitioners] that the crisis

created by the current asbestos litigation would be ameliorated were there a single proceeding that determined whether the subset of asbestos claims based on alleged exposure to automotive friction products satisfies the threshold standard of scientific validity established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)." App. 40a-41a (internal quotation omitted). But the court held that it could not address that argument because "we are halted at the pass by our conclusion that we have no jurisdiction over the decision of the District Court denying the transfer and remanding the cases to the state courts from which they came." App. 41a.

As a threshold matter, the Third Circuit declined to decide whether to construe the district court's order as the denial of a transfer motion or the grant of a remand motion. Rather, "[b]ecause there are arguments to support construing the order as one denying the requested transfer and equally good arguments to construe the order as one remanding the cases, we will follow the prudent course and consider in turn our jurisdiction under each construction." App. 19a. The court never considered whether the order was reviewable as *neither* a transfer order nor a remand order because it purported to be both of these logically inconsistent things at once.

First construing the order as the denial of a transfer motion, the Third Circuit declared that "[i]t is a well-established rule in this circuit (and generally) that orders transferring venue are not immediately appealable." App. 19a (internal quotation omitted). Based entirely on that single sentence and the accompanying citations, the court held that mandamus was the only mechanism for reviewing the denial of a transfer motion, and that petitioners had not satisfied the demanding standard for mandamus review. App. 20a-31a.

Next construing the order as the grant of a remand motion, the Third Circuit rejected petitioners' reliance on *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), for the proposition that remand orders beyond a court's statutory authority are not unreviewable. App. 34a. According to the

Third Circuit, all remand orders based on lack of subject matter jurisdiction are unreviewable, even where (as here) they are challenged as beyond the district court's statutory authority. *Id.* In any event, the Third Circuit proceeded to hold that the remand order here was *not* beyond the district court's statutory authority on the ground that federal courts are authorized to remand bankruptcy-related claims directly to state court across jurisdictional lines. App. 34a-36a. Having held that appellate jurisdiction was lacking, the Third Circuit then proceeded to hold that mandamus jurisdiction also was lacking, and that in any event petitioners had not satisfied the demanding standard for mandamus review. App. 36a-40a & n.13.

On the same afternoon that it issued its opinion dismissing the appeal for lack of appellate jurisdiction, the Third Circuit issued the following order: "Inasmuch as the number of judges in active service on this court who are not recused in this appeal is insufficient to order rehearing en banc, . . . the mandate shall issue forthwith." App. 45a. The court did not explain why, contrary to the Federal Rules of Appellate Procedure, *see* Fed. R. App. P. 40(a), it precluded petitioners from filing even a petition for panel rehearing.

That same afternoon, petitioners filed an emergency motion to recall the mandate to allow the entry of a stay pending this petition. The Third Circuit summarily denied the motion. App. 46a. Petitioners then applied unsuccessfully for an emergency stay from this Court.

On August 6, 2002, the Delaware district court posted on its website an order purporting "to remand all of the friction product cases transferred to the United States District Court for the District of Delaware to the state courts where they were originally filed." App. 96a. None of the claims thereby ostensibly "remanded" to state courts across the country has since proceeded to final judgment. Although some of those claims have since been settled, thousands still remain. Accordingly, petitioners respectfully file this petition for *certiorari*.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS WRONG AND CREATES NUMEROUS CIRCUIT CONFLICTS.

This case presents the question whether a district court can evade appellate review of a transfer order by simply calling it a remand order. Until the decision below, it was established (and uncontroverted by respondents) that a district court order denying a motion to transfer bankruptcy claims under 28 U.S.C. § 157(b)(5) was appealable as either a "final" or a "collateral" order. *See In re Dow Corning Corp.*, 86 F.3d 482, 487-88 (6th Cir. 1996). So the district court here did not simply deny petitioners' motion to transfer; rather, the court purported (in the same order denying the motion to transfer) to "remand" these claims directly to the state courts from which they had been removed all across the country, thereby allowing respondents to argue that the order was unreviewable as a remand order. But that disposition of the claims makes no sense: the district court could not logically have refused to transfer the claims to itself from other federal courts and then remanded those very same claims directly to state courts. Without addressing this fundamental anomaly, the Third Circuit simply announced that the order was not appealable as *either* a transfer order or a remand order. The appellate court thereby erred, and created circuit conflicts, on both grounds.

A. The Third Circuit Erred, And Created A Circuit Conflict, By Holding That An Order Denying A Transfer Motion Under 28 U.S.C. § 157(b)(5) Is Not Appealable.

The sum and substance of the Third Circuit's analysis of the appealability of a transfer order consists of the following sentence and accompanying citations: "It is a well-established rule in this circuit (and generally) that orders transferring venue are not immediately appealable." App. 19a (internal quotation omitted). None of the cases on which the Third Circuit relied, however, involved the denial of a Section 157(b)(5) transfer motion in the bankruptcy context. That context is critical

because, as petitioners pointed out below (and respondents did not contest) the Sixth Circuit specifically held in *Dow Corning* that the denial of a Section 157(b)(5) transfer motion *was* appealable as both a final and a collateral order. 86 F.3d at 487-88.

The decision below is thus flatly inconsistent with *Dow Corning*. At issue there were personal-injury claims involving silicone gel breast implants. 86 F.3d at 485. Many of those claims were brought against the debtor, Dow Corning—a major manufacturer of such implants—but tens of thousands of additional claims were brought against nondebtors, including the debtor's shareholders and other implant manufacturers and suppliers. *Id.* There, as here, the nondebtor defendants removed state-court claims to federal court, and obtained an order under 28 U.S.C. § 157(b)(5) provisionally transferring all such claims to the district court where the underlying bankruptcy was pending for the purpose of obtaining a global *Daubert* hearing on all the claims. *Id.* at 486-87. There, as here, the district court ultimately denied the transfer motion on the ground that the claims against nondebtors were not "related to" the underlying bankruptcy within the meaning of 28 U.S.C. § 1334(b) because "an entirely separate proceeding" for indemnification and/or contribution would be necessary to increase the bankruptcy estate's liability. *Id.* at 487, 491.

But in *Dow Corning*, unlike here, the court of appeals held that the denial of a transfer motion under § 157(b)(5) *was* appealable, and proceeded to address the bankruptcy jurisdiction issue on the merits. *See id.* at 487-88. As the Sixth Circuit explained, the finality requirement of 28 U.S.C. § 1291 "is considered in a more pragmatic and less technical way in bankruptcy cases than in other situations." *Id.* at 488 (internal quotation omitted). That is so, the court noted, because "[b]ankruptcy cases frequently involve protracted proceedings with many parties participating. To avoid the waste of time and resources that might result from reviewing discrete portions of the action only after a plan of reorganization is

approved, courts have permitted appellate review of orders that in other contexts might be considered interlocutory." *Id.* (internal quotation omitted). Because the denial of a Section 157(b)(5) transfer motion "'finally disposes of discrete disputes within the larger case,'" the decision is final and appealable within the meaning of Section 1291. *Id.* (quoting *In re Saco Local Dev. Corp.*, 711 F.2d 441, 444 (1st Cir. 1983) (Breyer, J.)).

The Sixth Circuit also held in the alternative that the denial of a Section 157(b)(5) transfer motion is appealable "under the collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949))." *Dow Corning*, 86 F.3d at 488. That is so, the court explained, because such an order "(1) conclusively determines the disputed question; (2) resolves an important question completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from final judgment." *Id.*

And *Dow Corning* hardly stands alone on this point. Indeed, the Sixth Circuit relied on the Fourth Circuit's decision in *A.H. Robins Co. v. Piccinin*, 788 F.2d 994 (1986), which asserted appellate jurisdiction over an order *granting* a motion to transfer bankruptcy claims under Section 157(b)(5). *Id.* at 1009. As the Fourth Circuit explained, a dispute over such a transfer "illustrates well the justification for the relaxed rule of appealability in bankruptcy cases." *Id.* Should a Section 157(b)(5) transfer motion be erroneously granted or denied, "months and months of litigation, carried on at great expense to all concerned might be voided and the reorganization derailed, with consequent extensive delays both in reorganization and in resolution of the claims of the tort plaintiffs themselves." *Id.* Like the Sixth Circuit in *Dow Corning*, the Fourth Circuit in *A.H. Robins* thus concluded that the grant or denial of a Section 157(b)(5) transfer motion is appealable as either a final or a collateral order. *See id.*

Indeed, the Third Circuit's contrary conclusion makes no sense. The justification for denying immediate appellate

review of an order prior to resolution of all claims in a case is that the order can ultimately be reviewed at a later date. *See, e.g., Cunningham v. Hamilton Cty., Ohio*, 527 U.S. 198, 203-04 (1999). As the Fourth and Sixth Circuits recognized, that justification simply does not apply in this context. As a practical matter, a district court's denial of a transfer motion under Section 157(b)(5) means that the movant must litigate the claims elsewhere. Any suggestion that the movant could challenge the district court's jurisdictional ruling years later after confirmation of a final plan of reorganization is fanciful. Thus, either the district court here properly declined jurisdiction over these claims or it did not; either way, this is a purely legal question that must be conclusively resolved at the outset. By holding that the district court's resolution of this jurisdictional issue was not appealable, the Third Circuit effectively denied petitioners their right to an appeal. Because that decision is clearly wrong and creates a circuit split, this Court's review is warranted.

B. The Third Circuit Erred, And Created A Circuit Conflict, By Holding That A Cross-Jurisdictional Remand Is Not Appealable.

The Third Circuit next held that the challenged order was also unappealable if construed as a remand order. App. 31a-36a. Petitioners acknowledged below the general rule that remand orders are unappealable, but noted that this rule does not apply to remand orders beyond the district court's statutory authority, *see, e.g., Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336 (1976)—like the remand orders here, which purported to remand bankruptcy-related claims removed to other federal courts directly to state courts across jurisdictional lines. The Third Circuit rejected petitioners' position on two grounds. According to that court, (1) remand orders based on lack of subject matter jurisdiction are categorically unappealable *even if* beyond the district court's authority, App. 34a, and (2) in any event, the "cross-jurisdictional" remand orders here were not beyond the district court's authority, App.

34a-36a. The Third Circuit erred, and created circuit conflicts, on both grounds.

1. The Third Circuit Erred, And Created A Circuit Conflict, By Holding That A Remand Based On Lack Of Subject Matter Jurisdiction Is Not Appealable Even If Beyond The District Court's Statutory Authority.

Petitioners relied below on this Court's decision in *Thermtron* for the proposition that remand orders beyond a district court's statutory authority—even if based on lack of subject matter jurisdiction—are appealable. *Thermtron* held that, notwithstanding the apparently categorical language of 28 U.S.C. § 1447(c), a remand order is reviewable where the district judge "exceed[s] his statutorily defined power" by "remand[ing] a properly removed case on grounds that he had *no authority* to consider." 423 U.S. at 351 (emphasis added). Otherwise, the Court noted, district courts would have "carte blanche authority . . . to revise the federal statutes governing removal" by remanding cases at will. *Id.*[2]

The Third Circuit rejected this interpretation of *Thermtron*. According to that court, this Court "clarified" the scope of *Thermtron* in *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995) by stating that "'[a]s long as a district court's remand is based on a timely raised defect in removal procedure or on lack of subject-matter jurisdiction—the *grounds* for

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[2] The *Thermtron* Court also held that a remand order must be reviewed by way of mandamus, not appeal, "because an order remanding a removed action does not represent a *final* judgment reviewable by appeal." 423 U.S. at 352-53 (emphasis added). This Court subsequently retreated from the latter holding in *Quackenbush v. Allstate Insurance Co.*, ruling that a remand order is indeed a "final" (and hence appealable) decision within the meaning of 28 U.S.C. § 1291. *See* 517 U.S. 706, 714-15 (1996). *Quackenbush*, however, expressly reaffirmed *Thermtron*'s core holding that Section 1447(d) does not preclude appellate review of remand orders beyond a court's statutory authority. *See* 517 U.S. at 711-12.

remand recognized by § 1447(c)—*a court of appeals lacks jurisdiction to entertain an appeal of the remand order under § 1447(d).*'" App. 34a (quoting 516 U.S. at 127-28) (emphasis added). The Third Circuit interpreted this language from *Things Remembered* to limit *Thermtron* by categorically rendering unappealable any remand order based on lack of subject matter jurisdiction, even where (as here) that order is challenged as beyond the district court's statutory authority. *See* App. 34a ("As the basis for the District Court's remand in this case was lack of subject matter jurisdiction (the absence of 'related to' jurisdiction), appeal is similarly barred.").

That interpretation of *Things Remembered* is untenably overbroad. The *Things Remembered* Court reaffirmed—not limited—*Thermtron's* holding that remand orders beyond a district court's authority are appealable. 516 U.S. at 127-28. Generally (but not invariably) remand orders are within a district court's authority if they are based on the two grounds enumerated in 28 U.S.C. § 1447(c): (1) lack of subject matter jurisdiction and/or (2) a defect in removal procedure. It is in this context that the *Things Remembered* Court made the statement on which the Third Circuit seized—that remand orders based on "the *grounds* for remand recognized by § 1447(c)" are unappealable. 516 U.S. at 127-28 (emphasis added). The *Things Remembered* Court simply did not address, much less resolve, the issue whether a remand based on a ground specified in § 1447(c)—such as lack of subject matter jurisdiction—was nonetheless appealable *if otherwise beyond the district court's authority*. Needless to say, *Things Remembered* cannot be deemed to have changed the law on this point that *Things Remembered* did not even address. *See, e.g., United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952); *Webster v. Fall*, 266 U.S. 507, 511 (1925).

Indeed, the Third Circuit's narrow interpretation of *Thermtron* (as "clarified" by *Things Remembered*) is squarely inconsistent with caselaw from other circuits holding that remands based on lack of subject matter jurisdiction are

appealable if challenged as beyond a district court's authority. Thus, the Fifth Circuit has asserted appellate jurisdiction over a remand order based on lack of subject matter jurisdiction where the district court exceeded its authority by failing to recuse itself. *See Tramonte v. Chrysler Corp.*, 136 F.3d 1025, 1028 (5th Cir. 1998). Similarly, the Sixth Circuit has asserted appellate jurisdiction over a remand order based on lack of subject matter jurisdiction where the order was unauthorized because entered by a non-Article III magistrate judge. *See Vogel v. U.S. Office Prods. Co.*, 258 F.3d 509, 518-19 (6th Cir. 2001). Likewise, the Eighth Circuit has asserted appellate jurisdiction over a remand order based on lack of subject matter jurisdiction where the district court exceeded its authority by ignoring binding circuit law. *See Xiong v. Minnesota*, 195 F.3d 424, 426-27 (8th Cir. 1999). And the Eleventh Circuit has asserted appellate jurisdiction over a remand order based on lack of subject matter jurisdiction where the district court exceeded its authority by relying on a post-removal amendment to determine the amount in controversy. *See Poore v. American-Amicable Life Ins. Co.*, 218 F.3d 1287, 1291-92 (11th Cir. 2000). As all these cases make clear, "under *Thermtron*, we have jurisdiction to decide whether a district court has the *power* to do what it did in issuing a remand order, although we cannot examine whether a particular exercise of power was proper." *In re Ford Motor Co./Citibank (South Dakota), N.A. Cardholder Rebate Litig.*, 264 F.3d 952, 965 (2001) (emphasis added; internal quotation and brackets omitted), *cert. granted sub nom. Ford Motor Co. v. McCauley*, 534 U.S. 1126 (2002), *cert. dismissed as improvidently granted*, 2002 WL 31299625 (Oct. 15, 2002). A district court cannot evade appellate review, in other words, by simply purporting to remand a case for lack of subject matter jurisdiction if the remand order is otherwise beyond the court's statutory authority.

The Third Circuit's position that *Things Remembered* stands for the proposition that appellate review of a remand order is categorically "barred" *whenever* that order is based on a lack

of subject matter jurisdiction, App. 34a, thus creates a conflict with no fewer than four other circuits. All of the foregoing cases from other circuits were decided after *Things Remembered*, and all of those cases hold that a remand order based on a lack of subject matter jurisdiction is appealable where (as here) the district court lacks authority to enter that order. Because (as explained below) the district court here exceeded its statutory authority by purporting to remand these claims directly to state courts across the country, the Third Circuit erred, and created a circuit split, by interpreting *Things Remembered* to preclude appellate review.

2. The Third Circuit Erred, And Created A Circuit Conflict, By Holding That A Cross-Jurisdictional Remand Is Not Beyond The District Court's Statutory Authority.

Perhaps sensing the implausibility of its interpretation of *Things Remembered*, the Third Circuit proceeded to reject petitioners' "premise that the District Court lacked authority to remand a case improvidently removed to a jurisdiction other than the one from which it came." App. 34a. Although the bankruptcy remand statute could not be clearer—only "*[t]he court to which such claim or cause of action is removed*" can "remand such claim or cause of action," 28 U.S.C. § 1452(b) (emphasis added)—the Third Circuit held that *other* federal courts could *also* remand claims. App. 34a-36a. That is so, according to the Third Circuit, because "the court to which a case has been transferred stands in the shoes of the court from which the case was transferred." App. 35a. The court gave no explanation as to how that general principle could overcome specific statutory language limiting the remand power.

As the Ninth Circuit has held, it cannot. *See Hudson-Ram L.P. v. Archer*, 210 F.3d 387, 2000 WL 14398 (9th Cir. Jan. 7, 2000) (unpublished). That case was in an identical procedural posture to this one: defendants removed a claim from state court to the local federal court, which then transferred the claim to the federal court where a related bankruptcy was pending,

and the latter court then purported to "remand" the case directly across jurisdictional lines to the original state court. *See id.* at *1. That, the Ninth Circuit held, the court lacked the power to do under the plain language of Section 1452(b), *see id.*—which thus rendered the unauthorized "remand" order appealable under *Thermtron*. As the Ninth Circuit explained, "[t]he order 'remanding' the action to Texas state court was not a valid exercise of the court's authority under 28 U.S.C. § 1452(b) because the United States District Court for the Central District of California was not the 'court to which [the] claim or cause of action [was] removed.'" *Id.* A re-transfer to the federal court to which the case was removed, rather than a direct cross-jurisdictional remand, was thus the only authorized course of action. "While the seriatim approach is not as efficient, it is the procedure mandated by Congress." *Id.*

The Third Circuit based its contrary decision on four other cases: (1) *Bloom v. Barry*, 755 F.2d 356 (3d Cir. 1985), (2) *Abels v. State Farm Fire & Cas. Co.*, 770 F.2d 26 (3d Cir. 1985), (3) *Republic of Venezuela v. Philip Morris Inc.*, 287 F.3d 192 (D.C. Cir. 2002), and (4) *AlliedSignal Recovery Trust v. Allied Signal Inc.*, 298 F.3d 263 (3d Cir. 2002). *See* App. 34a-36a. That reliance was wholly misplaced. The first three cases are inapposite, because they do not even involve the bankruptcy remand statute (and hence the unmistakably clear statutory language of Section 1452(b)). Although this Court has noted that the bankruptcy remand statute, 28 U.S.C. § 1452(b), and the general remand statute, 28 U.S.C. § 1447, should be construed in harmony where feasible, *see Things Remembered*, 516 U.S. at 129, that general principle does not allow courts to read the two provisions as identical where they are not. Thus, even if it were true that the general remand statute authorizes direct cross-jurisdictional remands (and none of the three cases on which the Third Circuit relied for that proposition actually addressed that issue), that would still not allow courts to ignore the language of the bankruptcy remand statute specifying that, with respect to claims improperly removed on grounds of federal bankruptcy jurisdiction, only

"*[t]he court to which such claim or cause of action is removed*" can "remand such claim or cause of action" to state court. 28 U.S.C. § 1452(b) (emphasis added).

The only case cited by the Third Circuit that actually addressed this issue, *AlliedSignal*, was decided by the Third Circuit on the same day as this case (and indeed based its conclusion on the decision in this case). *See* 298 F.3d at 271 ("If . . . the District Court [in Delaware] should desire itself to remand this case . . . to the Florida state court, such an order would appear to be within its authority. *See In re Federal Mogul*, Nos. 02-1426 et al. (3d Cir. July 31, 2002)."). Like the decision below, the *AlliedSignal* decision did not address the plain language of the bankruptcy remand statute or the Ninth Circuit's contrary decision in *Hudson-Ram*, but simply recited the general rule that "a transferee court is deemed to inherit all the authority of a transferor court." 298 F.3d at 271.

The Third Circuit's decisions below and in *AlliedSignal* not only ignore the plain language of Section 1452(b), and create a conflict with *Hudson-Ram*, but undermine the orderly and symmetrical bankruptcy removal and remand scheme. Under the plain language of the relevant statutes, claims must be removed from state court to the federal "district court where such [claim] is pending," and then remanded (if appropriate) by "[t]he court to which such claim or cause of action is removed." 28 U.S.C. §§ 1452(a), (b). These statutes simply do not authorize the procedural "short cut" of a cross-jurisdictional remand, which has led to substantial confusion in this very case as files have been stranded in the federal courts to which claims were removed, and some other such federal courts have proceeded to remand the claims anyway notwithstanding the Delaware court's purported direct cross-jurisdictional remand. The perceived "efficiency" of this short cut is thus questionable: enforcing the statutes as written would maximize the efficiency of the system as a whole by providing clear and understandable jurisdictional rules. But—as the Ninth Circuit emphasized in *Hudson-Ram*—even if direct

cross-jurisdictional remands were the most efficient means for returning claims to state courts, that would hardly justify ignoring the relevant statutes' plain language. *See* 2000 WL 14398, at *1; *see also Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 43 (1998).

II. THE DECISION BELOW IS OF SIGNAL LEGAL AND PRACTICAL IMPORTANCE.

The appellate jurisdiction issues set forth above merit this Court's review in their own right to resolve the myriad circuit conflicts created by the decision below. But this Court need not, and indeed cannot, ignore the fact that these issues arise here in the context of the exploding national asbestos litigation crisis. The underlying issue here—whether the district court had jurisdiction to conduct a global *Daubert* hearing that could resolve thousands of asbestos friction-product claims in one fell swoop—is of signal legal and practical importance, and certainly should not be resolved without *any appellate review* (especially where, as here, such review plainly would have been available in other circuits, and where the Third Circuit departed from ordinary procedure by denying petitioners the opportunity for either panel or *en banc* rehearing).

This Court is in a unique position to appreciate the importance of this case to the American judicial system as a whole. Because asbestos claims cannot be resolved through class action lawsuits consistent with Rule 23 and due process, *see, e.g., Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), the state courts have now been buried under an avalanche of individual asbestos claims, many of which name hundreds of defendants. The response of many state courts has been to devise procedural "short cuts" for aggregate resolution of these claims that, to say the least, raise due process concerns of the first order. *See, e.g., West Virginia ex rel. Mobil Corp. v. Gaughan,* 563 S.E.2d 419 (W. Va. 2002). It is all fine and good for the judiciary to lament Congress' failure to enact national asbestos legislation, *see* App. 41a-42a, but such a lament provides no

excuse for the judiciary to forswear reliance on the existing provisions of the U.S. Code (including the bankruptcy jurisdiction statute) to address the "elephantine mass of asbestos cases," *Ortiz*, 527 U.S. at 821. Indeed, in an extraordinary concurrence in *Ortiz*, three Justices of this Court declared that they agreed with the two dissenting Justices about the compelling need to devise a rational solution to the national asbestos litigation crisis, but simply could not justify bending Rule 23 to meet that end. *See Ortiz*, 527 U.S. at 865 (Rehnquist, C.J., joined by Scalia and Kennedy, JJ.); *see also id.* at 866-68 (Breyer, J., joined by Stevens, J., dissenting). This case presents an opportunity for this Court actually to do something about the crisis, in the course of resolving circuit conflicts on important issues of appellate jurisdiction, rather than simply observing the grotesque distortion of American law under the hydraulic pressure of current asbestos litigation.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of *certiorari*.

Respectfully submitted,

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APPENDIX

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APPENDIX A

PRECEDENTIAL

Filed July 31, 2002

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 02-1426, 02-1491, 02-1492, 02-1528
02-1652, 02-1664, 02-1688, 02-1741

IN RE: FEDERAL-MOGUL GLOBAL, INC.

DaimlerChrysler Corporation; Ford Motor Company;
General Motors Corporation,
Appellants in No. 02-1426

IN RE: FEDERAL-MOGUL GLOBAL, INC.

Hennessy Industries, Inc.
Appellant in No. 02-1491

IN RE: FEDERAL-MOGUL GLOBAL, INC.

MG Rover Group, Inc.; Nissan North America, Inc.;
Volkswagen of America, Inc.; Volkswagen AG;
Mercedes-Benz USA, LLC; BMW North America, Inc.;
Volvo Cars North America, Inc.; Harley-Davidson
Motor Company Group, Inc.,
Appellants in No. 02-1492

IN RE: FEDERAL-MOGUL GLOBAL, INC.

Salvo Auto Parts; Holman Enterprises, Inc.;
B.F. Goodrich, Inc.,
Appellants in No. 02-1528

IN RE: FEDERAL-MOGUL GLOBAL, INC.

Honeywell International, Inc.,
Appellant in No. 02-1652

IN RE: FEDERAL-MOGUL GLOBAL, INC.

British Motor Cars Distributors, Inc.,
Appellant in No. 02-1664

IN RE: FEDERAL-MOGUL GLOBAL, INC.

Official Committee of Unsecured Creditors,
Appellant in No. 02-1688

IN RE: FEDERAL-MOGUL GLOBAL, INC.

International Truck and Engine Corp.,
Appellant in No. 02-1741

On Appeal from the United States District Court
for the District of Delaware
(D.C. No. 01-10578)
District Judge: Hon. Alfred M. Wolin

Argued June 17, 2002

Before: SLOVITER, COWEN and GIBSON*
(Filed: July 31, 2002)

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OPINION OF THE COURT

SLOVITER, *Circuit Judge:*

Before us is an appeal of the District Court's decision denying the motion to transfer tens of thousands of asbestos-related tort claims and remanding these claims to the state courts where they were originally filed, primarily on the ground that the District Court had no subject matter jurisdiction. The appellants, who moved for the transfer in the District Court, argue that the District Court has subject-matter jurisdiction over these claims because they are "related to" the ongoing bankruptcy proceeding of Federal-Mogul Global, a company which, through its affiliates, manufactured products allegedly involved in the asbestos-related torts. The central issue before us is whether this court has jurisdiction to review the District Court's decision to deny the transfer and to remand.

I.

BACKGROUND

A.

Procedural Posture

Tens of thousands of individuals (Friction Product Plaintiffs or Plaintiffs) have brought personal injury and wrongful death claims in state courts across the country seeking damages for injuries allegedly caused by asbestos used in so-called friction products, such as brake pads (Friction Product Claims). The Friction Product Plaintiffs allege that they were exposed to asbestos fibers through, *inter alia*, the manufacture, installation, repair, and/or use of friction products and that this exposure caused them or their decedents to develop severe respiratory diseases, such as asbestos-related mesothelioma, asbestos-related lung, laryngeal or esophageal cancer, or asbestosis. They have brought their tort claims against various

manufacturers and distributors of friction products (including Federal-Mogul Global, Inc., which had acquired Apex and Wagner, makers of friction products) as well as against companies that made and sold products that incorporated friction products (in particular, automobile manufacturers that used brake pads containing asbestos).

On October 1, 2001, Federal-Mogul and its 156 affiliates and subsidiaries (Debtors) filed Chapter 11 petitions in the United States Bankruptcy Court for the District of Delaware. At that time, Debtors were co-defendants in many (though not all) of the thousands of Friction Product Claims now before us. The filing of the Debtors' Chapter 11 petitions stayed the state court proceedings as to them.

Thereafter, the Friction Product Plaintiffs began severing or dismissing their claims against Debtors. Other defendants named in the Friction Product suits (Friction Product Defendants or Defendants) began removing the claims against them from state courts to the appropriate federal district courts pursuant to 28 U.S.C. § 1452(a) (bankruptcy removal), arguing that the Friction Product Claims were "related to" the Debtors' bankruptcy proceeding and thus subject to the bankruptcy jurisdiction of the federal courts under 28 U.S.C. § 1334(b). The primary theory in support of "related to" jurisdiction is that the Friction Product Defendants would be able to seek indemnification or contribution from Debtors because some of the friction products used by Defendants were purchased from Debtors.

In response to the removal of the claims, the Friction Product Plaintiffs filed motions in the respective federal district courts to remand the cases to state court on the theory that removal was improper. Some of these district courts granted these motions to remand.

In November 2001, the chief judge of this circuit, pursuant to 28 U.S.C. § 292(b), assigned Judge Alfred M. Wolin, a senior district judge in the District of New Jersey, to sit by

designation in the District of Delaware to manage five asbestos-related Chapter 11 proceedings, including that of Debtors. Three of the Friction Product Defendants (DaimlerChrysler Corporation, Ford Motor Company, and General Motors; hereinafter, the Big Three Automakers) had previously filed a motion to transfer provisionally to the District Court, pursuant to 28 U.S.C. § 157(b)(5),[1] all of the removed Friction Product Claims pending against them in various district courts throughout the country. Thereafter, Volkswagen of America, Inc., Volkswagen AG, Mercedes-Benz USA, LLC, BMW North America, Inc., Volvo Cars North America, Inc., Rolls Royce Bentley Motor Cars, Inc., and Nissan North American, Inc. (hereinafter, the International Automakers) and Honeywell International, Inc.,[2] as well as other Friction Product Defendants, also started removing and then transferring the Friction Product Claims against them to the District Court in Delaware.

Before the District Court could rule on any motions, some of the district courts to which the Friction Product Claims had originally been removed remanded cases before them back to the state courts. *See, e.g., Dunn v. DaimlerChrysler Corp.*, No. 3:01-CV-2870-X, 2002 WL 1359701 (N.D. Tex. Jan.3, 2002); *In re Asbestos Litig.*, 271 B.R. 118 (S.D. W.Va. Dec.7, 2001); *Clamon v. Kellogg-Brown & Root, Inc.*, No. G-01-784 (S.D. Tex. Dec. 6, 2001). Other district courts refused to

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[1] That section provides:

> (5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

28 U.S.C. § 157(b)(5).

[2] Honeywell is a successor in interest to Bendix Corporation, which manufactured friction productions functionally identical to those manufactured by Federal-Mogul. Bendix would sometimes purchase Federal-Mogul's products or components to sell under its own brand name.

transfer their Friction Product Claims to the District Court. *See, e.g., In re Asbestos Litig.*, No. 01-1790, 2002 U.S. Dist. LEXIS 3083 (D. Or. Feb. 1, 2002). And some of the plaintiffs in cases that had been transferred to the District Court filed emergency motions for remand because they were *in extremis*, and sought to have the cases tried in state court before they died. The most pressing matter before the District Court was decision on the motions of the Friction Product Defendants for immediate and ex parte provisional transfer of all Friction Product Claims and their proposal that the District Court thereafter render a plenary decision on the actual transfer of the Friction Product Claims under 28 U.S.C. § 157(b)(5).

The primary reason offered by the Friction Product Defendants for the transfer was to consolidate the Friction Product Claims "for purposes of a threshold common issues trial devoted to the core issue of whether brakes and other automotive parts cause the diseases claimed." App. at 474. Specifically, Defendants wanted the District Court to conduct a "global *Daubert* hearing" in which the court would perform its "gatekeeper" function as outlined in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993) ("[Under the Rules [of Evidence] the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."), and amplified in *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 147 (1999). In particular, Defendants wanted the District Court to determine whether the evidence that Defendants' products harmed Plaintiffs is based on reliable scientific methodology. In their memorandum in support of their motion to transfer, the Big Three Automakers maintained that there is "no reliable scientific evidence to support any claim based on exposure to [the Friction P]roducts." App. at 664. Accordingly, the Friction Product Defendants argued that the promise of the "global *Daubert* hearing" is to "excise[ ] [the Friction Product Claims] from the American judicial system in one fell swoop and [lift] a substantial cloud . . . from over Federal Mogul." Br. of Big Three Automakers at 2.

The District Court granted the provisional transfer pursuant to § 157(b)[3] in order to consider the appropriateness of actual transfer as well as to examine its subject matter jurisdiction and the appropriateness of abstention and remand. *In re Federal-Mogul Global, Inc.*, No. 01-10589 et al., 2001 U.S. Dist. LEXIS 23553 (D. Del. Dec. 19, 2001) (granting Honeywell's provisional transfer motion); App. at 598 (same with respect to Big Three Automakers); App. at 608 (International Automakers); App. at 624 (Harley- Davidson Motor Company Group, Inc.); App. at 615 & 630 (other Defendants). Subsequently, the Friction Product Defendants succeeded in obtaining mandamus orders from two appellate courts prohibiting district courts to which the Friction Product Claims had originally been removed from deciding any issues in those cases. *In re Gen. Motors Corp.*, No. 02-1273 (7th Cir. Feb 15, 2002) (App. at 1017); *In re DaimlerChrysler Corp.*, No. 02-10029, et al., 2002 U.S. App. LEXIS 8756 (5th Cir. Mar. 8, 2002). Those two courts reasoned that the District Court's provisional transfer had taken away any jurisdiction that those district courts may have had. *Id.*

B.

District Court's Ruling

After hearing oral arguments on the pending motions to transfer and remand, the District Court issued the following order, which was followed shortly thereafter by an opinion:

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[3] Although § 157(b) does not explicitly allow for such provisional transfers, they have been permitted by some courts. *See, e.g., A.H. Robins Co. v. Piccinin (In re A. H. Robins Co.)*, 788 F.2d 994, 1015-16 (4th Cir. 1986) (approving district court's transfer order interpreting that order as "conditional" pending objections of the parties and requests for abstention); *In re Dow Corning Corp.*, No. 95-20512, 1995 WL 495978, at *2 (Bankr. E.D. Mich. 1995) (granting provisional transfer pending hearing to determine whether the transfer order should be made permanent). The parties before us do not question the legitimacy of a provisional transfer and therefore we do not address that issue.

ORDER 1) DENYING THE MOTIONS TO TRANSFER THE "FRICTION PRODUCTS CLAIMS" AND 2) REMANDING THE FRICTION PRODUCTS CLAIMS

This matter having been opened before the Court upon the several motions of parties, denominated in the prior Orders of the Court as the "Friction Products Defendants," to transfer to this District into the above-captioned proceedings the claims against the movants previously denominated "Friction Products Claims"; and the Court having previously granted this motion on a provisional basis and the Friction Products Claims having already been provisionally transferred to this Court subject to a plenary hearing on the motion to transfer; and the Court having previously given notice to the parties that it would consider arguments directed to subject matter jurisdiction, abstention and remand in ruling upon the movants' applications; and the Court having reviewed the submissions of counsel and heard oral argument; and for the reasons set forth on the record at the hearing on those motions today, as supplemented by a written Opinion to follow; and for good cause shown

It is this 8th day of February 2002

ORDERED that the motions to transfer the Friction Products Claims are denied, and it is further

ORDERED that this Court lacks subject matter jurisdiction over the Friction Products Claims, and it is further

ORDERED that the Friction Products Claims are remanded to the state courts from which they were removed pursuant to 28 U.S.C. § 1447, and it is further

ORDERED that, in the alternative, the Friction Products Claims are remanded to the state courts from which they were removed pursuant to 28 U.S.C. § 1452.

In re Federal-Mogul Global, Inc., No. 01-10587, 2002 Bankr. LEXIS 105, *4-5 (Bankr. D. Del. Feb. 8, 2002)

(hereinafter, Feb. 8 Order). The District Court's written opinion supplementing the order was issued on February 15, 2002. *In re Federal-Mogul Global, Inc.*, No. 01-10578 et al., slip op. (Bankr. D. Del. Feb. 15, 2002) (hereinafter, Feb. 15 Op.).

The District Court held that it lacked subject-matter jurisdiction because the claims against the Friction Product Defendants were not "related to" the Federal-Mogul bankruptcy proceedings. The court found it unlikely that "Congress . . . intended that the bankruptcy of a single player [in a multi-player industry] would have automatic, nation-wide impact in which every manufacturer and distributor and all tens of thousands of injured parties are concentrated in a single reorganization proceeding." Feb. 15 Op. at 16. Specifically, the District Court found that under this court's influential decision in *Pacor, Inc. v. Higgins (In re Pacor)*, 743 F.2d 984 (3d Cir. 1984), "related-to bankruptcy jurisdiction [does] not extend to a dispute between non-debtors unless that dispute, by itself, creates at least the logical possibility that the estate will be affected." *Id.* at 17.

The District Court noted that *Pacor* made clear that there is no "related to" jurisdiction over a personal injury claim against a non-debtor "without the filing and adjudication of a separate claim for indemnification" against the debtor. *Id.* at 18. Further, the District Court observed that "cases since *Pacor* have failed to endorse the proposition that *any* contract of indemnification will support an extension of related-to jurisdiction." *Id.* at 22 (emphasis in original).

Turning to the Friction Product Claims, the District Court stated that:

> [T]he movants have produced no evidence whatsoever of even a bare agreement to indemnify running between the debtors and the solvent co-defendants . . . .
>
> The Court sees no justification to take the situation . . . outside of the rule of *Pacor*. *A judgment against [the*

> *Friction Product Defendants] will not bind the debtors.* No asset of the estate is threatened nor is any re-ordering of creditors in the offing. *It is true that recovery by asbestos claimants against the movants may give rise to claims, indeed very substantial claims, against the debtors in the future. It is at that time, when the movants appear as creditors of the estate and the facts underlying the liability are adjudicated in the context of the bankruptcy, that the Friction Products Claims will affect the estate.*

Id. at 22-23 (emphasis added).

The District Court noted that only Chrysler submitted documents that could even plausibly support a claim based on a written indemnification agreement, namely boiler-plate purchase orders that refer to documents containing indemnification language. The District Court held that the "routine nature of this kind of arrangement and lack of other connections between [Chrysler and Debtors] makes this ["boiler-plate" language] too thin a thread with which to pull Chrysler into the Federal-Mogul bankruptcy." *Id.* at 27. Although the court found that Chrysler had a comparatively stronger claim for indemnification than the other Friction Product Defendants, it found that none of them had genuine indemnification claims "related to" the bankruptcy case. The court found that even if there were a judgment against one of the Friction Product Defendants, Debtors would not be bound by that decision and that any indemnification claims against Debtors by the Friction Product Defendants have not yet accrued. *Id.* at 23.

Alternatively, and apparently because there might be some basis for Chrysler's indemnification claims, the District Court announced that, even if it did have jurisdiction, it would abstain from hearing the Friction Product Claims pursuant to 28 U.S.C. § 1334(c)(1) (bankruptcy abstention) in light of considerations of fairness, comity, and the integrity of the bankruptcy process. Feb. 15 Op. at 28 & 36.

Having found that it lacked jurisdiction (or, in the alternative that abstention was appropriate), the District Court remanded the Friction Product Claims directly to the state courts from which they were removed pursuant to 28 U.S.C. § 1452(b). While the court acknowledged that it was "rare for a District Court in one state to remand a matter to the state courts of another state," Feb. 15 Op. at 37, the District Court concluded that such action was permitted by § 1452 and justified by principles of efficiency and fairness.

C.

The Appeal

The Friction Product Defendants appealed the District Court's order. This court granted a temporary stay of the order remanding the Friction Product Claims. App. at 53-54. Four groups of Defendants have filed briefs in this appeal: The Big Three Automakers, Honeywell, the International Automakers, and the Official Committee of Unsecured Creditors of Federal-Mogul Global.[4] Additionally, the Washington Legal Foundation and Traveler's Indemnity Company each filed an amicus brief in support of Defendants.

The Friction Product Defendants argue that the District Court erred in (1) finding that it lacked "related to" jurisdiction, (2) deciding to remand the claims directly to the state courts from which they were removed, and (3) determining, in the alternative, that it would abstain. In particular, they argue that the District Court misread this court's seminal decision in *Pacor* and mistakenly ignored the persuasive authority of the Sixth Circuit's decision in *Lindsey v. O'Brien (In re Dow Corning Corp.),* 86 F.3d 482 (6th Cir.

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[4] The Official Committee of Unsecured Creditors represents holders of approximately two and a half billion dollars of Federal-Mogul's commercial, trade, and bond debt. Although the unsecured creditors do not, in general, have any Friction Product Claims pending against them, for simplicity's sake we include them among the Defendants.

1996). Further, they argue that remand to state court was not authorized because only a court to which a claim was removed has the statutory power to remand to the state court from which that claim was removed. Thus, they conclude that the District Court erred by remanding the claims to state court, and also erred by abstaining with respect to any remaining claims. Further, Defendants argue that the District Court failed to adequately consider whether to conduct a global *Daubert* hearing. Finally, some Defendants argue that *Pacor* is flawed and is at odds with this court's later decisions concerning "related to" jurisdiction. Br. of Honeywell at 13-18.

Four groups of Friction Product Plaintiffs have filed briefs: the Official Committee of Asbestos Claimants of Federal-Mogul Global, the Ad Hoc Committee of Asbestos Claimants, the Unofficial Committee of Asbestos Claimants, and the Waters & Kraus Plaintiffs.[5] The Friction Product Plaintiffs argue, first, that this court lacks appellate jurisdiction to review the decision of the District Court in light of 28 U.S.C. § 1447(d), which provides that a remand "to the State court from which [a case] was removed is not reviewable on appeal or otherwise." § 1447(d). In the alternative, they argue that the District Court was correct in finding that it had no "related to" jurisdiction and in deciding to remand the claims directly to the various state courts from which they were removed. Also, in addition to endorsing the District Court's alternative holding to abstain pursuant to 28 U.S.C. § 1334(c)(1) (discretionary abstention), Plaintiffs maintain that the District Court should have abstained pursuant to 28 U.S.C. § 1334(c)(2) (mandatory abstention). Further, some Plaintiffs argue that Defendants' proposed "global *Daubert* hearing" is inapplicable to the Friction Product Claims in light of the "infinite variety of exposure histories and medical facts

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[5] The Waters & Kraus Plaintiffs have dismissed all Friction Product Claims they had brought against Federal-Mogul. Otherwise, there are no substantial differences among the various committees of asbestos claimants.

presented by the tens of thousands of claimants . . . [and f]ifty states' laws on causation and burden of proof." Br. of Ad Hoc Committee at 2.

II.

JURISDICTION

Before we can reach the merits of the District Court's decision, we must determine whether we have jurisdiction to consider this appeal. The District Court denominated its Order as "1) denying the motions to transfer the 'friction products claims' and 2) remanding the friction products claims." Feb. 8 Order at *4. To make an assessment of our jurisdiction we must first consider whether to construe the decision of the District Court as a denial of a transfer or as a remand order.

Because there are arguments to support construing the order as one denying the requested transfer and equally good arguments to construe the order as one remanding the cases, we will follow the prudent course and consider in turn our jurisdiction under each construction. Each presents substantial obstacles to our exercise of appellate jurisdiction. We will discuss the District Court's alternative holding abstaining from hearing the Friction Product Claims only if we need to reach that issue.

A.

Denial of Transfer

1. *Reviewability*

It is a well-established rule in this circuit (and generally) that "'orders transferring venue are not immediately appealable.'" *Sunbelt Corp. v. Noble, Denton & Assoc.*, 5 F.3d 28, 30 (3d Cir. 1993) (quoting *Carteret Sav. Bank, FA v. Shushan*, 919 F.2d 225, 228 (3d Cir. 1990)); *see also Hershey Foods Corp. v. Hershey Creamery Co.*, 945 F.2d 1272, 1278 (3d Cir. 1991) ("It is well-settled that orders granting or denying a change in venue are not proper subjects for interlocutory appeals.") (citing *Nascone v. Spudnuts, Inc.*, 735 F.2d 763, 764 (3d Cir.

1984)); 15 Charles Alan Wright et al., *Federal Practice & Procedure* § 3855, at 472 (2d ed. 1986 & Supp. 2002) ("It is entirely settled that an order granting or denying a motion to transfer under 28 U.S.C.A. § 1404(a) is interlocutory and not immediately appealable . . . ."). However, we, like other courts, have held that "'[m]andamus is . . . the appropriate mechanism for reviewing an allegedly improper transfer order.'" *In re United States,* 273 F.3d 380, 385 (3d Cir.2001) (alteration and ellipsis in original) (quoting *Sunbelt,* 5 F.3d at 30); *see also Van Dusen v. Barrack,* 376 U.S. 612, 615 n.3 (1964); *In re Sealed Case,* 141 F.3d 337, 340 (D.C. Cir. 1998); *Warrick v. Gen. Elec. (In re Warrick),* 70 F.3d 736, 739 (2d Cir. 1995); *National-Standard Co. v. Adamkus,* 881 F.2d 352, 356 n.3 (7th Cir. 1989); *Sunshine Beauty Supplies, Inc. v. U.S. Dist. Ct.,* 872 F.2d 310, 311 (9th Cir. 1989); *Hustler Magazine v. U.S. Dist. Ct.,* 790 F.2d 69, 70 (10th Cir. 1986).

Of course, review via mandamus necessarily is more circumscribed than review by appeal. As we have stated, "[M]andamus jurisdiction affords an appellate court less opportunity to correct district court error in the case before it and less opportunity to provide guidance for future cases. Moreover, comity between the district and appellate courts is best served by resort to mandamus only in limited circumstances." *Kelly v. Ford Motor Co. (In re Ford Motor Co.),* 110 F.3d 954, 964 (3d Cir. 1997).

In reviewing a transfer order by mandamus, we recently observed, "While 28 U.S.C. § 1651(a) grants federal courts the general power to issue writs, it is widely accepted that mandamus is extraordinary relief that is rarely invoked." *United States,* 273 F.3d at 385. In *Sunbelt,* we described the standards for issuing mandamus with respect to a district court's transfer order:

> Our review of the district court's transfer order on a petition for a writ of mandamus is governed by familiar principles. A writ of mandamus is an extraordinary remedy, the issuance of which is generally committed to the sound

discretion of the issuing court. *Carteret*, 919 F.2d at 232-33; *In re School Asbestos Litig.*, 977 F.2d [764,] 772 [(3d Cir. 1992)] . . . .

Generally, a writ will only issue if the district court did not have the power to enter the order, and then "only if the party seeking the writ meets its burden to demonstrate that its right to the writ is clear and indisputable." [*Carteret*, 919 F.2d] at 232. Thus, we turn to whether or not the district court had the power to transfer this action.

Sunbelt, 5 F.3d at 30.[6]

This court has on various occasions construed an appeal as a petition for a writ of mandamus. *See, e.g., In re Nwanze*, 242

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[6] The Supreme Court has stated that "only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy." *Will v. United States*, 389 U.S. 90, 95 (1967) (quoting *De Beers Consol. Mines, Ltd v. United States*, 325 U.S. 212, 217 (1945)). It has listed among the conditions for the issuance of a writ of mandamus that "the party seeking . . . the writ have no other adequate means to attain the relief he desires," *Kerr v. U.S. Dist. Ct.*, 426 U.S. 394, 403 (1976) (citing *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943)), and that the right to the writ is "'unclear and indisputable,'" *id.* (quoting *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953) (quotation omitted)).

As one commentator has noted, "The circuit court articulations of what constitutes a 'clear and indisputable' right to the writ vary to some degree, but virtually all suggest that some blatant or unconscionable misstep by the district court is needed." Timothy P. Glynn, *Discontent and Indiscretion Review of Interlocutory Orders*, 77 Notre Dame L. Rev. 175, 199 (2001). Glynn distinguishes among courts that require a usurpation of power by the district courts, *id.* at 200 & n.94 (citing *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1295 (7th Cir. 1995); *In re Pearson*, 990 F.2d 653, 656 (1st Cir. 1993); *In re Int'l Precious Metals Corp.*, 917 F.2d 792, 793 (4th Cir. 1990)), those that require "shocking abuse of discretion, exercise of power in excess of jurisdiction, or other outrageous behavior," *id.* at 200 & n.95 (citing, *inter alia*, *In re Chambers Dev. Co.*, 148 F.3d 214, 223 (3d Cir. 1998); *In re Sealed Case*, 141 F.3d at 339; *Boughton v. Cotter Corp.*, 10 F.3d 746, 751 (10th Cir. 1993)), and the Ninth Circuit's less stringent standard, *id.* at 200 & n.6 (citing *Bauman v. U.S. Dist. Ct.*, 557 F.2d 650, 654-55 (9th Cir. 1977)).

F.3d 521, 524 (3d Cir. 2001); *Nascone*, 735 F.2d at 773. Defendants request that we do so here, Reply Br. of Big Three at 21,[7] and we proceed to consider whether to issue a writ of mandamus in light of Defendants' arguments that the District Court erred in denying their transfer motion.

2. *District Court's Rationale for Denial of Transfer*

The District Court denied the Defendants' motion to transfer after holding that it lacked subject-matter jurisdiction over the Friction Product Claims because they were not "related to" Federal-Mogul's bankruptcy proceeding. That holding, in turn, was based on its understanding of this court's decision in *Pacor Inc. v. Higgins (In re Pacor)*, 743 F.2d 984 (3d Cir. 1984), where we interpreted the scope of the statutory "related to" jurisdiction of bankruptcy courts.

In *Pacor*, John and Louise Higgins sued Pacor in Pennsylvania state court for work-related injuries to John Higgins caused by exposure to asbestos supplied by Pacor. Pacor filed a third-party complaint impleading Johns-Manville, the manufacturer of the asbestos. Thereafter, Manville filed for Chapter 11 bankruptcy in the Southern District of New York. Pacor filed a petition for removal in the Bankruptcy Court for the Eastern District of Pennsylvania seeking to remove the Higgins' case from state court to federal bankruptcy court and simultaneously to transfer it from that court to the New York district court where it would be joined with the rest of the Johns-Manville bankruptcy proceedings. The theory of Pacor's petition was that the Higgins suit was "related to" the Manville bankruptcy proceeding. The bankruptcy court denied the petition and remanded the case. *Pacor*, 743 F.2d at 986-87. We affirmed. Analyzing the "related to" provision, we concluded:

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[7] In their Emergency Motion for Stay Pending Appeal before this court, the Big Three Automakers specifically asked this court to issue a writ of mandamus. Emergency Motion for Stay Pending Appeal, 02-1426, at 6 (filed Feb. 11, 2002).

> [T]he primary action between Higgins and Pacor would have no effect on the Manville bankruptcy estate, and therefore is not "related to" [the Manville] bankruptcy [proceeding]. At best, it is a mere precursor to the potential third party claim for indemnification by Pacor against Manville. Yet the outcome of the Higgins-Pacor action would in no way bind Manville, in that it could not determine any rights, liabilities, or course of action of the debtor. Since Manville is not a party to the Higgins-Pacor action, it could not be bound by res judicata or collateral estoppel. Even if the Higgins-Pacor dispute is resolved in favor of Higgins (thereby keeping open the possibility of a third party claim), Manville would still be able to relitigate any issue, or adopt any position, in response to a subsequent claim by Pacor. Thus, the bankruptcy estate could not be affected in any way until the Pacor-Manville third party action is actually brought and tried.

Id. at 995 (citations omitted).

The arguments made by Pacor were not dissimilar to those made by Defendants here, but we rejected them, saying:

> Pacor stresses that the Higgins-Pacor claim would affect the Manville bankruptcy estate, in that *without* a judgment for plaintiff Higgins in that action, there could never be a third party indemnification claim against Manville. This argument does not alter our conclusion. At best, one could say that a judgment against the plaintiff on the primary claim would make absolutely certain that the Manville estate could never be adversely affected. This does not prove the converse, however, that a judgment in favor of the plaintiff Higgins necessarily does affect the estate. The fact remains that any judgment received by the plaintiff Higgins could not itself result in even a contingent claim against Manville, since Pacor would still be obligated to bring an entirely separate proceeding to receive indemnification.

Id. (emphasis in original).

Thus, the District Court interpreted *Pacor* and its progeny to hold that "related-to bankruptcy jurisdiction will not extend to a dispute between non-debtors unless that dispute, by itself, creates at least the logical possibility that the estate will be affected." Feb. 15 Op. at 17.

Pacor has been favorably cited in dozens of decisions of this court. As we have observed:

> The test . . . articulated in *Pacor* has been enormously influential. *Pacor* not only governs our analysis here, but its cogent analytical framework has been relied upon by our sister circuits more than any other case in this area of the law . . . .
>
> Even for those circuits that have not formally adopted *Pacor*, [it] has provided an indispensable and frequently cited frame of reference, a veritable beacon on the uncharted and perilous waters of bankruptcy subject matter jurisdiction. The references to *Pacor* in Shepard's Citations are legion. When federal courts must consider whether an issue is a related proceeding, the starting point has universally been *Pacor*.

Torkelsen v. Maggio (In re Guild & Gallery Plus, Inc.), 72 F.3d 1171, 1181 & n.5 (3d Cir. 1996).

Pacor clearly remains good law in this circuit.[8] Under our operating procedures, we cannot revisit *Pacor* unless we are sitting en banc. Moreover, the Supreme Court has endorsed the core of this court's opinion in *Pacor*, saying:

> We agree with the views expressed by the Court of Appeals for the Third Circuit in *Pacor* . . . that "Congress intended to

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[8] Honeywell argues that *Pacor* is unreasonable in various ways and that *Lindsey v. O'Brien (In re Dow Corning Corp.)*, 86 F.3d 482 (6th Cir. 1996), articulates a better approach to related-to jurisdiction. Br. of Honeywell at 13-18. Honeywell's arguments are not ultimately persuasive and, as we note in the text, we are not in a position to reject *Pacor* without en banc review. 3d Cir. Internal Operating P. 9.1.

> grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate," and that the "related to" language of § 1334(b) must be read to give district courts (and bankruptcy courts under § 157(a)) jurisdiction over more than simply proceedings involving the property of the debtor or the estate. We *also agree with that court's observation that a bankruptcy court's "related to" jurisdiction cannot be limitless.*

Celotex Corp. v. Edwards, 514 U.S. 300, 308 (1995) (citations omitted) (citing and quoting *Pacor*, 743 F.2d at 994) (emphasis added). The Supreme Court noted the general acceptance of *Pacor*, commenting that all of the courts of appeal have adopted the *Pacor* test with little or no variation with the exception of the Second and Seventh Circuits, which have adopted slightly different tests. *Id.* at 308-309 n.6.

Notwithstanding the widespread acceptance of *Pacor*, Defendants argue that the Friction Product Claims are "related to" the Federal-Mogul bankruptcy proceeding because the various claims against them could lead to substantial indemnification or contribution claims against Federal-Mogul, which would in turn significantly affect the administration of the bankruptcy estate and the development of an appropriate plan of reorganization. They focus on our articulation of the *Pacor* test for "related to" jurisdiction as "whether *the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy*." *Pacor*, 743 F.2d at 994 (emphasis in original). Defendants emphasize that in *Pacor* we stated that a civil "proceeding need not necessarily be against the debtor" to give rise to "related to" jurisdiction; it is enough that the outcome of such a proceeding "could alter the debtor's rights, liabilities, options, or freedom of action." *Id.* They argue that the outcome of the Friction Product Claims could conceivably have an effect on Debtors' estate, because it is "conceivable" that if the Friction Product Plaintiffs succeed in their claims against them, the Friction Product

Defendants would seek indemnification and/or contribution from Federal-Mogul.

Their reading of the word "conceivable" ignores the precise holding of *Pacor* where, despite the seemingly broad language of the opinion, we found no "related to" jurisdiction for the Higgins lawsuit against Pacor because the outcome of that lawsuit could not result "in even a contingent claim" against the debtor (Manville); rather, "an entirely separate proceeding to receive indemnification" would have been required. *Id.* at 995. The test articulated in *Pacor* for whether a lawsuit could "conceivably" have an effect on the bankruptcy proceeding inquires whether the allegedly related lawsuit would affect the bankruptcy proceeding without the intervention of yet another lawsuit. Therefore, because any indemnification claims that the Friction Product Defendants might have against Debtors have not yet accrued and would require another lawsuit before they could have an impact on Federal-Mogul's bankruptcy proceeding, we cannot hold that the District Court's ruling that it lacked subject-matter jurisdiction because the Friction Product Claims were not "related to" the Federal-Mogul bankruptcy proceeding was a "clear error . . . approach[ing] the magnitude of an unauthorized exercise of judicial power." *Lusardi v. Lechner,* 855 F.2d 1062, 1069 (3d Cir. 1988) (citing *Will v. Calvert Fire Ins. Co.,* 437 U.S. 655, 661 (1978)). We therefore conclude that the District Court's decision does not justify issuance of a writ of mandamus.

The arguments by the Friction Product Defendants for the existence of "related to" bankruptcy jurisdiction draw heavily on the decision of the Sixth Circuit in *Dow Corning,* 86 F.3d 482 (6th Cir. 1996). Dow Corning, the largest producer of silicone-gel breast implants, also sold silicone materials to other manufacturers of such implants. It and other manufacturers and suppliers of silicone implants were sued by thousands of recipients of the implants for personal injuries related to the silicone implants. Dow Corning filed for Chapter 11 bankruptcy. The bankruptcy filing automatically stayed all

of the silicone implant cases against it, but not the claims against Dow Chemical and Corning, Inc. (its co-defendants as well as its shareholders) or the claims against the other three co-defendants. As in this case, the various co-defendants removed many of these personal injury claims from state court to federal court. Dow Corning then moved to transfer the removed cases to the district court that had jurisdiction over its Chapter 11 proceedings, and the co-defendants joined in its motions, relying on the "related to" provision of the Bankruptcy Code. The district court held that it did not have "related to" jurisdiction over the claims against the co-defendants but the court of appeals, citing *Pacor,* reversed.

After noting that Dow Corning's co-defendants may have thousands of claims of indemnification and contribution against Dow Corning and that Dow Corning may have similar claims against them, the court concluded that the district court had "related to" jurisdiction over the silicone implant claims of Dow Corning's non-shareholder co-defendants based on the following reasoning:

> We find that it is not necessary for the appellees first to prevail on their claims against the nondebtor defendants, and for those companies to establish joint and several liability on Dow Corning's part, before the civil actions pending against the nondebtors may be viewed as conceivably impacting Dow Corning's bankruptcy proceedings. The claims currently pending against the nondebtors give rise to contingent claims against Dow Corning which unquestionably could ripen into fixed claims. *The potential for Dow Corning's being held liable to the nondebtors in claims for contribution and indemnification, or vice versa, suffices to establish a conceivable impact on the estate in bankruptcy.* Claims for indemnification and contribution, whether asserted against or by Dow Corning, obviously would affect the size of the estate and the length of time the bankruptcy proceedings will be pending, as well as Dow

> Corning's ability to resolve its liabilities and proceed with reorganization.

Dow Corning, 86 F.3d at 494 (emphasis added).

The court concluded:

> Cognizant of the fact that "related to" jurisdiction cannot be limitless and concerned about granting benefits of the automatic stay in bankruptcy to solvent codefendants, we nevertheless believe the possibility of contribution or indemnification liability in this case is far from attenuated. We conclude that Section 1334(b) jurisdiction exists over the actions pending against [Dow Corning's co-defendants].

Id.

The *Dow Corning* court distinguished *Pacor* as follows:

> In addition, we believe there is a qualitative difference between the single suit involved in *Pacor* and the overwhelming number of cases asserted against Dow Corning and the nondebtor defendants in this case. A single possible claim for indemnification or contribution simply does not represent the same kind of threat to a debtor's reorganization plan as that posed by the thousands of potential indemnification claims at issue here.

Id.

The Friction Product Defendants extrapolate from *Dow Corning* a rule that "related to" jurisdiction exists over claims against non-debtors when these non-debtors have potential contribution and indemnification claims. However, they cannot persuasively argue that *Dow Corning* rather than *Pacor* should have provided the rule of law the District Court should have followed.

The District Court stated that it was:

> unconvinced by the *Dow Corning* panel's main point of distinction between that case and *Pacor*. The Sixth Circuit reasoned that *Pacor* contained only one claim, whereas in

> *Dow Corning* many thousands of plaintiffs were suing the non-debtors. This Court regards with misgiving the proposition that mere numbers of claims should prevail over articulable principles when it comes to defining federal subject matter jurisdiction.

Feb. 15 Op. at 15-16.

The District Court referred only briefly to the Fifth Circuit's decision in *Arnold v. Garlock, Inc.*, 278 F.3d 426 (5th Cir. 2001), *reh'g denied*, 288 F.3d 234 (2002), which presents issues like those before us. Like the Friction Product Defendants here, Garlock, a co-defendant of Federal-Mogul in over eighty asbestos-related tort cases, removed the tort claims against it and moved for transfer to the Federal-Mogul bankruptcy proceeding. Garlock made the same arguments that Defendants make before us, and relied on *Dow Corning* to support "related to" jurisdiction. The Fifth Circuit distinguished *Dow Corning* saying:

> In *In re Dow Corning*, the Sixth Circuit reversed and ordered the United States District Court for the Eastern District of Michigan to transfer under § 157(b)(5) a relatively small number of non-debtor co-defendants who had asserted claims for contribution, or announced the intent of doing so, against the debtor manufacturer of silicone breast implants. *In re Dow Corning*, 86 F.3d at 498. In that case, each of the co-defendants was closely involved in using the same material, originating with the debtor, to make the same, singular product, sold to the same market and incurring substantially similar injuries. This circumstance created a unity of identity between the debtor and the co-defendants not present here, where the co-defendants variously use asbestos for brake friction products, insulation, gaskets, and other uses.
>
> Therefore, while we do not disagree that certain mass tort claims in some circumstances might be consolidated with bankruptcy proceedings in a single district in accordance

> with § 157(b)(5), the relationship of the co-defendants in . . . *In re Dow Corning* is distinguishable from Garlock's asserted relationship, through a claim for contribution, to the debtor here.

Id. at 440. The Fifth Circuit's analysis in *Garlock* of the "related to" provision of the Bankruptcy Code is consistent with the result on the same issue reached by the District Court in this case.

We, however, remain a step away from reaching the merits of whether the District Court has "related to" jurisdiction. Instead, because our appellate jurisdiction is at issue, we review the District Court's denial of Defendants' transfer motion in the context of deciding whether to grant a writ of mandamus. We have recently stated that a writ of mandamus may issue only if "the district court committed a 'clear error of law' at least approach[ing] the magnitude of an unauthorized exercise of judicial power, or a failure to use that power when there is a duty to do so," *Trans Penn Wax Corp. v. McCandless,* 50 F.3d 217, 227 (3d Cir. 1995) (alteration in original) (quoting *Richman Bros. Records, Inc. v. U.S. Sprint Communications Co.,* 953 F.2d 1431, 1448 (3d Cir. 1991) (quotation omitted)), and only when "the party seeking [mandamus] demonstrates a clear and indisputable right to [it]." *Id.* (citing *Carteret Sav. Bank*, 919 F.2d at 232).

The Friction Product Defendants have not met this rigorous standard for the issuance of the extraordinary writ of mandamus as to the District Court's denial of the motion to transfer. *See, e.g., In re United States,* 273 F.3d at 385; *Solomon v. Cont'l Am. Life Ins. Co.*, 472 F.2d 1043 (3d Cir. 1973) (denying petition for mandamus regarding a transfer order). *See also Dalton v. United States (In re Dalton),* 733 F.2d 710, 716-18 (10th Cir. 1984) (same in the bankruptcy context); *In re McDonnell-Douglas Corp.*, 647 F.2d 515, 517 (5th Cir. 1981) (same); *Toro Co. v. Alsop*, 565 F.2d 998 (8th Cir. 1977) (denial of mandamus petition regarding transfer in anti-trust context); 16 Charles Alan Wright et al., *Federal*

Practice & Procedure § 3935.4, at 619-26 (2d ed. 1996) (discussing use of mandamus applied to transfer orders). We will deny the request to issue a writ of mandamus to compel the District Court to transfer the Friction Product Claims under § 1334(b).

B.

Remand Order

1. *Appellate Jurisdiction*

We next consider whether we have jurisdiction to review the decision of the District Court if we construe that decision as a remand order.

The Friction Product Defendants removed the Friction Product Claims to various federal courts pursuant to 28 U.S.C. § 1452 (bankruptcy removal). That section provides:

> (a) A party may remove any claim or cause of action in a civil action . . . to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 [the general jurisdictional provisions of the bankruptcy code] of this title.
>
> (b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. *An order entered under this subsection remanding a claim* or cause of action, or a decision to not remand, *is not reviewable by appeal or otherwise by the court of appeals* under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.

28 U.S.C. § 1452 (emphasis added).

The comparable provisions applicable to non-bankruptcy cases are in 28 U.S.C. §§ 1441 and 1447. Section 1441(a) provides:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

Sections 1447(c) and (d) provide:

> (c) . . . If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded . . . .
>
> (d) *An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise*, [except for certain civil rights cases].

28 U.S.C. § 1447 (emphasis added).

At one time, various courts, including this one, held that judicial review of the remand of a claim removed pursuant to the Bankruptcy Code was governed exclusively by § 1452(b), the provision governing remand of removed claims "related to" bankruptcy, not by § 1447(d), the general procedural provision governing remand after removal. *See Pacor*, 743 F.2d at 990-92 (discussing § 1478, the predecessor of § 1452). Subsequently, the Supreme Court rejected this view, stating:

> There is no express indication in § 1452 that Congress intended that statute to be the exclusive provision governing removals and remands in bankruptcy. Nor is there any reason to infer from § 1447(d) that Congress intended to exclude bankruptcy cases from its coverage. The fact that § 1452 contains its own provision governing certain types of remands in bankruptcy . . . does not change our conclusion. There is no reason §§ 1447(d) and 1452 cannot comfortably coexist in the bankruptcy context. We must, therefore, give effect to both.

Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 129 (1995).[9] Giving effect to both § 1447(d) and § 1452(b) and applying them to a remand order involving claims allegedly "related to" a bankruptcy proceeding, it is apparent that such a remand is expressly "not reviewable by appeal or otherwise." 28 U.S.C. § 1452(b). *See also* 28 U.S.C. § 1447(d) (remand orders "not reviewable on appeal or otherwise.").

Defendants argue that this court has jurisdiction to review the remand order because neither § 1447(c) nor § 1452(a) authorized the District Court to remand the Friction Product Claims to the state courts from which they were removed. Specifically, the Friction Product Defendants argue that the remand order was not authorized because § 1447(c) only authorizes remand by the district court to which the claims were removed and only authorizes remand to a court from which the removed claims most recently came. Relatedly, they note that the language of § 1452(b) is even more specific as it only authorizes remand by "[t]he court to which such claim or cause of action is removed." Therefore, they contend that once the District Court decided the jurisdictional issue against them, it only had the options of (i) vacating the provisional transfer order, (ii) denying the final transfer order, or (iii) transferring the claims back to the district courts from which they were provisionally transferred. Reply Br. of Big Three Automakers at 18.[10] In any event, as they view the situation, the District

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[9] While *Things Remembered* overruled *Pacor* on this precise issue, it did not disturb the other holdings of *Pacor*. *See, e.g., Halper v. Halper*, 165 F.3d 830, 837 n.8 (3d Cir. 1999).

[10] They assume that under any of these options, the District Court's decision would have been subject to appellate review. As we discussed in the previous section, that would not necessarily be the case.

Court had no authority to remand the claims directly to the state courts.[11]

Defendants' argument that we are not precluded from reviewing the cross-jurisdictional remands because they were unauthorized by statute stems in part from the Supreme Court's holding in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 345-46 (1976), that only remand orders based on grounds specified in § 1447(c) are immune from review under § 1447(d). In *Thermtron*, the remand was ordered solely on the ground of the district court's heavy docket. The Court's subsequent opinion in *Things Remembered* clarified the scope of the prohibition of review of remand orders imposed by § 1447(d). The Court held appellate review was properly denied of an order remanding a case which had been untimely removed. 516 U.S. at 128. As Justice Thomas stated for the Court, "As long as a district court's remand is based on a timely raised defect in removal procedure or on lack of subject-matter jurisdiction—the grounds for remand recognized by § 1447(c)—a court of appeals lacks jurisdiction to entertain an appeal of the remand order under § 1447(d)." *Id.* at 127-28. As the basis for the District Court's remand in this case was lack of subject matter jurisdiction (the absence of "related to" jurisdiction), appeal is similarly barred.

Moreover, Defendants' premise that the District Court lacked authority to remand a case improvidently removed to a jurisdiction other than the one from which it came is belied by two decisions of this court. In *Bloom v. Barry*, 755 F.2d 356 (3d Cir. 1985), a breach of warranty case commenced in a Florida state court was removed to the District Court for the Southern District of Florida and then transferred to the District

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[11] It is unlikely that if the District Court had returned the cases to the district courts from which they came, under the law of the case doctrine, those district courts would have been free to reject the ruling of the District Court on the "related to" jurisdiction issue, but we need not decide that issue.

Court for the District of New Jersey. The latter court found that it lacked subject-matter jurisdiction and remanded the case to a New Jersey state court, a venue in which the case had never been. We granted a writ of mandamus, concluding that while the New Jersey district court was right to remand the case, it was wrong to remand it to the New Jersey state court. We therefore vacated the district court's order and directed it to remand the case to the Florida state court pursuant to § 1447(c). *Id.* at 358. In explaining our decision directing remand to the Florida state court from which it had been removed rather than to the United States District Court in Florida from which it had come, we stated, "[f]ollowing the change of venue [the District Court for] the District of New Jersey had the same authority with respect to disposition of the case as had the District Court for the Southern District of Florida." *Id.* We held that, just as the district court in Florida could have remanded the case to Florida state court if it found any jurisdictional defects, after transfer so too could the district court in New Jersey. *Id. Bloom's* holding that the court to which a case has been transferred stands in the shoes of the court from which the case was transferred, at least with respect to remand pursuant to § 1447, is relevant here. *See also AlliedSignal Recovery Trust v. Allied Signal Inc.*, Nos. 01-1111, 01-1355, 01-1399 (3d Cir. July 31, 2002).

Similarly, in *Abels v. State Farm Fire & Cas. Co.*, 770 F.2d 26 (3d Cir. 1985), a tort action commenced in California state court was removed to the United States District Court for the Central District of California and then transferred pursuant 28 U.S.C. § 1404 to the United States District Court for the Western District of Pennsylvania where the relevant documents and many witnesses were located. The district court in Pennsylvania held that the plaintiff's claims were time-barred and it dismissed the action. On appeal, we vacated the dismissal because we found that there was no diversity of citizenship and therefore the federal courts lacked subject-matter jurisdiction. *Id.* at 31-33. Although we considered "remanding [the case] directly to the California state court, or

routing [the case] through the federal district court in Los Angeles," *id.* at 33 n.13, we decided to remand the case to the district court in Pennsylvania with instructions that it remand the case to the California state court, not to the California district court that had transferred the case to the Pennsylvania district court. Thus, once again we authorized a cross-jurisdictional remand. In sum, the relevant precedent from this court supports the District Court's cross-jurisdictional remand order.

The case before us is in some ways similar to the recent decision of *Republic of Venezuela v. Philip Morris Inc.*, 287 F.3d 192 (D.C. Cir. 2002), in which foreign countries brought various actions in a Florida state court to recover damages from certain tobacco companies. The cases were removed to federal district court in Florida and then transferred to the federal district court in the District of Columbia. That court held that it lacked subject-matter jurisdiction under § 1447, and remanded four of the cases to the Florida state court. The tobacco companies appealed the remand order and petitioned for a writ of mandamus to prevent the district court from remanding the remaining two cases to the Florida state court. The Court of Appeals for the District of Columbia held that, under § 1447, it lacked jurisdiction to review the district court's remand order. *Id.* at 196. That holding is consistent with the statute and accords with our view of the appellate jurisdiction issue here. Accordingly, we hold that pursuant to § 1447(d), we do not have jurisdiction over the appeal of the District Court's order remanding the Friction Product Claims to the various state courts.

2. *Mandamus*

The Friction Product Defendants argue, as they did with respect to the denial of their motion to transfer, that we should construe their appeal as a petition for mandamus. They recognize that § 1447(d) states that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal *or otherwise*." 28 U.S.C. § 1447(d)

(emphasis added). We construed that language in *Feidt v. Owens Corning Fiberglas Corp.*, 153 F.3d 124 (3d Cir. 1998), where we held that "section 1447(d) prohibits review of remand orders 'whether erroneous or not and whether review is sought by appeal or by extraordinary writ.'" *Id.* at 126 (quoting *Thermtron*, 423 U.S. at 343). *See also Black & Decker (U.S.), Inc. v. Brown*, 817 F.2d 13, 14 (3d Cir. 1987) ("inclusion of the phrase 'or otherwise' [in § 1447(d)] precludes review of a remand order in a proceeding like the instant one that is originated by a petition for an extraordinary writ") (citing *Gravitt v. Southwestern Bell Tel. Co.*, 430 U.S. 723 (1977)). *Accord New v. Sports & Recreation, Inc.*, 114 F.3d 1092, 1095-96 (11th Cir. 1997) (finding no jurisdiction in light of § 1447(d) to consider appeal or petition for mandamus with respect to remand order); *Flores v. Long*, 110 F.3d 730, 733 (10th Cir. 1997) (same); *Gonzalez-Garcia v. Williamson Dickie Mfg. Co.*, 99 F.3d 490, 492 (1st Cir. 1996) (per curiam) (holding that § 1447(d) precludes mandamus review); *In re Bus. Men's Assurance Co. of Am.*, 992 F.2d 181, 182-83 (8th Cir. 1993) (per curiam) (same).

However, it is not as obvious that § 1452(b) prohibits review by mandamus. The language of that section provides that "[a]n order entered under this subsection remanding a claim or cause of action . . . is not reviewable by appeal *or otherwise* by the court of appeals *under* section 158(d), 1291, or 1292 of this title." 28 U.S.C. § 1452(b) (emphasis added).

On the one hand, the Friction Product Plaintiffs plausibly argue that the "or otherwise" language must refer to mandamus review. To read § 1452(b) as allowing for mandamus review renders the "or otherwise" language meaningless, in violation of the canon against surplusage. On the other hand, as the Friction Product Defendants argue, the statute enumerates the statutory sections that cannot be used to review remands and fails to mention 28 U.S.C. § 1651(a) (the All Writs Act). They construe this omission as permitting writs of mandamus. This is a plausible application of the *expressio unius est exclusio*

alterius (inclusion of one thing indicates exclusion of the other) canon of statutory interpretation.

In discussing whether remand decisions are subject to mandamus review, the Seventh Circuit, in *In re U.S. Brass Corp.*, 110 F.3d 1261 (7th Cir. 1997), held that "section 1452(b) bars review by appeal *or otherwise*, which would seem to take in mandamus, which anyway is available only when the applicant's right to it is *clear*." *Id.* at 1266 (emphasis in original) (citations omitted).

The legislative history is somewhat informative as to the proper interpretation of § 1452(b). The sentence at issue first appeared in the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 103, 98 Stat. 333, 335 (1984) (amended 1990) as follows: "Any order entered under this subsection remanding a claim or cause of action . . . is not reviewable by appeal or otherwise." Six years later, as part of the Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 309, 104 Stat. 5089, 5113 (1990), § 1452 was modified to its current form.

On behalf of the Courts Subcommittee of the Senate Judiciary Committee, Senator Charles Grassley, the ranking member of the subcommittee, read into the record its section-by-section analysis of the act. The relevant portions of its analysis read as follows:

> [The purpose of these changes is] to clarify that, with respect to certain determinations in bankruptcy cases, . . . appeals from the district courts to the courts of appeals [are forbidden but appeals are] not [forbidden] from bankruptcy courts to the district courts.
>
> The statutes [as written before the changes] provide that bankruptcy judges' orders deciding certain motions (motions to abstain in favor of, or remand to, state courts) are unreviewable "by appeal or otherwise." Because bankruptcy judges may enter trial orders only if there is appellate review in an Article III court, one result of this

> limitation is that bankruptcy judges cannot make final judgments in such cases even when they clearly involve "core" proceedings.
>
> [The changes] would authorize bankruptcy judges to enter binding orders in connection with abstention determinations under Title 11 or Title 28 and remand determinations under Title 28, subject to review in the district court. The statutory language under each of these sections now provides that the decision of the bankruptcy court (to abstain or remand) "is not reviewable by appeal or otherwise." The proposed amendment would modify these three sections to provide that the decision of the bankruptcy court is not reviewable "by the court of appeals . . . or by the Supreme Court of the United States . . . " Such determinations would therefore be reviewable by the district court.
>
> Speeding the disposition of these types of motions will better serve the purpose of the limitation on appeals from the district courts to the courts of appeals.

136 Cong. Rec. 36,290 (1990).

It thus appears that these 1990 changes were intended to make explicit that a district court, but not the Supreme Court or a court of appeals, could review a bankruptcy court's decision to remand and that decisions by a district court to remand were not reviewable. The broad scope of the original wording of the statute suggests that Congress did not intend to allow for mandamus review of remand decisions pursuant to § 1452(b). As is evident by the last paragraph of the quotation from Senator Grassley's remarks, Congress was interested in "speeding up" the effects of a district or bankruptcy court's decision to remand by precluding appellate review of such orders.

Both the statutory language itself and the intent of Congress as evidenced by the legislative history lead us to concur with the conclusion in *U.S. Brass Corp.*, 110 F.3d at 1266, that § 1452(b), particularly when read together with § 1447(d), bars

both appeal and mandamus review of orders remanding to state courts[12] pursuant to § 1452(b) and/or § 1447(c).[13] It follows that we must deny the requested petition for mandamus as to the District Court's order remanding to the state courts.[14]

C.

Coda

We are neither unaware of nor unsympathetic to the argument of the Friction Product Defendants that the crisis created by the current asbestos litigation would be ameliorated were there a single proceeding that determined whether "the subset of asbestos claims based on alleged exposure to automotive friction products satisfies the threshold standard of scientific validity established in *Daubert v. Merrell Dow*

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[12] In *AlliedSignal Recovery Trust v. Allied Signal Inc.*, Nos. 01-1111, 01-1355, 01-1355, (3d Cir. July 31, 2002), this court, following *Bloom* granted a writ of mandamus to vacate a district court order "remanding" a case to a Delaware state court where it had never been. In *Bloom*, we stated that "'[r]emand' means 'send back.' It does not mean 'send elsewhere.'" *Bloom*, 755 F.2d at 357. We note that in contrast the District Court in this case remanded to state courts from which the various cases had been removed.

[13] Even if we did have jurisdiction to consider a petition for a writ of mandamus, we would not issue such a writ for reasons similar to those we previously discussed in considering whether to issue a writ of mandamus construing the decision of the District Court as a denial of transfer.

[14] In light of our decision that we have no jurisdiction to review the District Court's order denying transfer and remanding, we need not consider its alternate order abstaining. Moreover, a straightforward reading of 28 U.S.C. § 1334(d) supports the view that we do not have appellate jurisdiction to review a district court's decision to abstain pursuant to § 1334(c)(1) (discretionary abstention). *See Things Remembered*, 516 U.S. at 131 n.1 (1995) (Ginsburg, J., concurring) ("Section 1334(c)(2) (now § 1334(d)) renders unreviewable district court decisions 'to abstain or not to abstain' from adjudicating state-law claims merely 'related to' a bankruptcy case, i.e., claims that do not independently qualify for federal-court jurisdiction.").

Pharmaceuticals., Inc., 509 U.S. 579 (1993)." Reply Br. of Big Three Automakers at 2. The arguments of appellants are based on their optimistic view that a *Daubert* hearing would lead to the rejection of the causation claims of all Plaintiffs. However, the evidence creates an issue that could well go either way as to whether Plaintiffs satisfy the *Daubert* gatekeeping standard. But this case is not in a posture to face the *Daubert* issue, as we are halted at the pass by our conclusion that we have no jurisdiction over the decision of the District Court denying the transfer and remanding the cases to the state courts from which they came.

Throughout Defendants' briefs and in their oral arguments they repeatedly contended that we are faced with the question "whether the American judicial system is capable of dealing with the recent explosion of automotive 'friction product' asbestos claims in a fair and rational manner." Br. of Big Three Automakers at 4. This is not dissimilar to the arguments made by the parties who sought approval of a settlement class of asbestos victims. The effort was rejected both by this court in *Georgine v. Amchem Products, Inc.*, 83 F.3d 610 (3d Cir. 1996), where we stated that "against the need for effective resolution of the asbestos crisis, we must balance the integrity of the judicial system," *id.* at 617, and by the Supreme Court, which affirmed that decision. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), *aff'g sub nom. Georgine*, 83 F.3d 610. Just as both courts declined to permit an end run around the requirements for class actions imposed by Federal Rule of Civil Procedure 23, so also are we unwilling to disregard the statutory impediments to our review of orders of the district courts transferring and remanding cases. Arguably, a procedure authorizing the aggregation of state court cases, such as the Friction Product Claims, into a nationwide class action would provide a mechanism for a *Daubert* hearing like the one Defendants seek, but such proposals, frequently made, have not passed both houses of Congress.

As Justice Ginsburg stated in *Amchem*, "The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution." *Id.* at 628- 29.

III.

CONCLUSION

For the reasons described above, this court does not have jurisdiction to review the decisions of the District Court denying the Friction Product Defendants' transfer motions and remanding the Friction Product Claims to the state courts from which they were originally removed. Further, insofar as we can consider Defendants' appeal construing it as a petition for a writ of mandamus, that petition is denied.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 02-1426, 02-1491, 02-1492, 02-1528
02-1652, 02-1664, 02-1688, 02-1741

IN RE: FEDERAL-MOGUL GLOBAL, INC.

DaimlerChrysler Corporation; Ford Motor Company;
General Motors Corporation,
Appellants in No. 02-1426

IN RE: FEDERAL-MOGUL GLOBAL, INC.

Hennessy Industries, Inc.
Appellant in No. 02-1491

IN RE: FEDERAL-MOGUL GLOBAL, INC.

MG Rover Group, Inc.; Nissan North America, Inc.;
Volkswagen of America, Inc.; Volkswagen AG;
Mercedes-Benz USA, LLC; BMW North America, Inc.;
Volvo Cars North America, Inc.; Harley-Davidson
Motor Company Group, Inc.,
Appellants in No. 02-1492

IN RE: FEDERAL-MOGUL GLOBAL, INC.

Salvo Auto Parts; Holman Enterprises, Inc.;
B.F. Goodrich, Inc.,

Appellants in No. 02-1528

IN RE: FEDERAL-MOGUL GLOBAL, INC.

Honeywell International, Inc.,
Appellant in No. 02-1652

IN RE: FEDERAL-MOGUL GLOBAL, INC.

British Motor Cars Distributors, Inc.,
Appellant in No. 02-1664

IN RE: FEDERAL-MOGUL GLOBAL, INC.

Official Committee of Unsecured Creditors,
Appellant in No. 02-1688

IN RE: FEDERAL-MOGUL GLOBAL, INC.

International Truck and Engine Corp.,
Appellant in No. 02-1741

On Appeal from the United States District Court
for the District of Delaware
(D.C. No. 01-10578)
District Judge: Hon. Alfred M. Wolin

Argued June 17, 2002

Before: SLOVITER, COWEN and GIBSON,* Circuit Judges

ORDER

Inasmuch as the number of judges in active service on this court who are not recused in this appeal is insufficient to order rehearing en banc, *see*, 28 U.S.C. § 46(c), Fed. R. App. P. 35(a), Third Circuit Local Appellate Rule 35.3, the mandate shall issue forthwith.

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: July 31, 2002

nmb/cc: All Counsel of Record

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* Hon. John R. Gibson, Senior United States Circuit Judge for the United States Court of Appeals for the Eighth Circuit, sitting by designation.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

July 31, 2002

Nos. 02-1426, 02-1491, 02-1492, 02-1528, 02-1652
02-1664, 02-1688 & 02-1741

IN RE: FEDERAL-MOGUL GLOBAL, INC.
(DE Bankruptcy Court No. 01-10578)

Present: SLOVITER, COWEN and GIBSON,
Circuit Judges

Emergency Motion by Appellants DaimlerChrysler Corp., Ford Motor Co., GM Corp., and Honeywell International, Inc. to Recall Mandate and Enter Stay Pending Filing of a Petition for Certiorari

/s/
Nicole M. Bruno
Case Manager (267) 299-4924

Opinion filed 7/31/02

ORDER

The foregoing motion to recall mandate and enter stay pending filing of a Petition for Certiorari is denied.

By the Court,

/s/ Dolores K. Sloviter
Circuit Judge

Dated: Aug 01 2002
nmb/cc: All Counsel of Record

APPENDIX D

DESIGNATION OF A DISTRICT JUDGE
FOR SERVICE IN ANOTHER DISTRICT WITHIN THE
CIRCUIT

WHEREAS, in my judgment the public interest so requires NOW, THEREFORE, pursuant to the provisions of Title 28 U.S.C. § 292(b), I do hereby designate and assign the Honorable Alfred M. Wolin of the United States District Court for the District of New Jersey to hold court in the District of Delaware during the period beginning November 27, 2001 and ending November 27, 2002, and for such additional time thereafter as may be required to complete unfinished business in the following cases:

Armstrong Work Industries	No. 00-4471
Federal-Mogul	No. 01-10578
USA	No. 01-2094
W.R. Grace	No. 01-1139
Owens Corning	No. 00-3837

This order is entered after consultation with and with and the assent of Chief Judge Sue L. Robinson, Judge Joseph J. Farnan, Jr., Judge Roderick R. McKelvie and Judge Gregory M. Sleet of the District of Delaware. As Chief Judge of the Court of Appeals and presiding officer of the Judicial Council of the Third Circuit, it is my considered judgment that these bankruptcy cases, which carry with them tens of thousands asbestos claims, need to be consolidated before a single judge so that a coordinated plan for management can be developed and implemented. It is contemplated that Judge Wolin will assign a portion of these cases to various bankruptcy judges sitting in the District of Delaware so they may assist in moving these matters forward. As a significant portion of the asbestos

cases in this country are proceeding under the aegis of this litigation, I deem this assignment and consolidation critically important to the administration of justice.

/s/

Edward R. Becker

Chief Judge of the Third Judicial Circuit

Dated: 11-27-01

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE: FEDERAL-MOGUL GLOBAL, INC., T&N LIMITED, et al.,	:	Chapter 11 Case Nos. 01-10578, et al.[1]
Debtors.	:	

ORDER: (1) PARTIALLY WITHDRAWING THE REFERENCE; and

(2) PROVISIONALLY TRANSFERRING CERTAIN FRICTION PRODUCT CLAIMS

This matter having been opened upon the motion of General Motors Corporation, Ford Motor Company and Daimler Chrysler Corporation for a motion to transfer (the "Transfer Motion") certain lawsuits against them arising out of so-called "friction products" as to which the movants content they have a right of indemnification against the debtors in these administratively consolidated Chapter 11 proceedings (the "Friction Product Claims"); and it appearing that movants have removed these cases from the several state courts to the United States District Courts for the District in which these cases were pending; and the movants having also moved for a provisional order of transfer to preserve the *status quo* pending a plenary hearing and determination by the Court of the Transfer Motion; and the Court having reviewed the several briefs and letters of counsel in support and in opposition to the provisional transfer motion; and good cause appearing.

It is this 10th day of December, 2001

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[1] See attached list.

ORDERED that, pursuant to 28 U.S.C. § 157 and the Order of this Court issued December 10, 2001, the reference of this case to the Bankruptcy Court, Judge Randall K. Newsome presiding, is hereby withdrawn with respect to the Transfer Motion and the provisional transfer motion, and with respect to matters involving subject matter jurisdiction, abstention and remand regarding the Friction Product Claims, and it is further

ORDERED that the application for a provisional transfer Order is granted and the Friction Product Claims are hereby provisionally transferred to this Court subject to further Order of the Court, and it is further

ORDERED that all parties shall refrain from submitting papers in support of or in opposition to the Transfer Motion pending further Order of the Court providing for notice, a briefing schedule and a hearing date for the Transfer Motion.

/s/
ALFRED M. WOLIN, U.S.D.J.

APPENDIX F

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE: FEDERAL-MOGUL GLOBAL, INC., T&N LIMITED, et al.,	:	Chapter 11 Case Nos. 01-10578, et al.:[1]
Debtors.	:	

ORDER OF CLARIFICATION RE: PROVISIONAL TRANSFER OF FRICTION PRODUCTS CLAIMS

This matter having been opened upon the Court's own motion; and the Court having withdrawn the reference with respect to several motions to transfer (the "Transfer Motions") claims pending in the several United States District Courts against defendant manufacturers of so-called "friction products" (respectively the "Friction Products Claims" and the "Friction Products Defendants") previously removed by the Friction Products Defendants from the several state courts; and for the reasons set forth in the letter opinion of the Court filed herewith; and for good cause shown

It is this [third] day of January, 2002

ORDERED that this Order governs all Provisional Transfer Orders whether already issued by the Court or that may be issued in the future and those Orders shall not be construed in a manner inconsistent with the terms of this Order, and it is further

ORDERED that the Provisional Transfer Orders are limited in effect to only those claims against the Friction Product Defendant(s) identified in the respective moving papers and

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[1] See attached list.

Provisional Transfer Orders and that no other claims and no other parties are affected by the Provisional Transfer Orders, and it is further

ORDERED that any Friction Product Claim that would have been subject to a Provisional Transfer Order previously issued by this Court but for the fact that such Friction Product Claim had not yet been removed on the date the Provisional Transfer Order was issued is hereby provisionally transferred to this Court subject to further Order of this Court, and it is further

ORDERED that counsel identified in the Court's previous Provisional Transfer Orders shall provide to claimants provisionally transferred by this Order such notice and waivers of further service as was specified in the relevant previous Orders, and it is further

ORDERED that claimants provisionally transferred by this Order shall not be subject to the briefing schedule with respect to the Transfer Motion, and shall file no papers in opposition to the Transfer Motion except as provided by further Order of this Court.

/s/
ALFRED M. WOLIN, U.S.D.J.

APPENDIX G

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

Chambers of
Alfred M. Wolin
Judge

Martin Luther King Jr. Federal Building
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(973)645-2580

January 3, 2002

LETTER OPINION - NOT FOR PUBLICATION
ORIGINAL FILED WITH THE CLERK OF THE COURT

IN RE: FEDERAL-MOGUL GLOBAL, INC., T&N LIMITED, et al.
Case Nos. 01-1578, et al.[1]

TO ALL COUNSEL:

This matter is opened before the Court upon its own motion. Familiarity with the motions to transfer and to provisionally transfer so-called "Friction Products Claims" to this Court is assumed. It has come to the attention of the Court through examination of certain papers submitted in support of motions to transfer and provisionally transfer by additional Friction Products Defendants and through informal communications of counsel that the Court's prior Orders have been interpreted inconsistently with either their terms, the Court's intent and/or the law.

First, only claims against the moving Friction Products Defendants were transferred to this Court by the Provisional Transfer Orders. The bankruptcy removal statute only permits the removal to a district court of a "claim or cause of action" within the federal bankruptcy jurisdiction. 28 U.S.C.

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[1] See attached list.

§ 1452(a). This does not authorize the wholesale removal of an entire case regardless of the existence of non-bankruptcy "claims or causes of action" or parties with no connection to a debtor. In taking this position, the Court speaks only for itself, of course, and does not purport to bind any transferor district court in which the balance of a case may still be pending following the improvident, overbroad removal. Nor should the Court be understood to endorse the proposition that federal bankruptcy jurisdiction is indeed correctly asserted with respect to the claims actually subject to the Provisional Transfer Orders.

Second, the only claims transferred to this Court are those that had already been removed to federal court on the date the relevant Provisional Transfer Order was entered. The Provisional Transfer Orders were entered by the Court in reliance on the representation that the movant Friction Products Defendants had already removed or were in the process of removing the claims against them. Regardless of whether section 157 of Title 28 empowers this Court to transfer claims to itself directly out of the state courts, and regardless of the retrospectively perceived desirability of interpreting the Provisional Transfer Order to transfer claims from state court, that was not the factional context within which the Court understood its ruling would operate. Therefore, the Court's Orders do not effect the transfer of Friction Products Claims not already pending within the federal court system on the date the applicable Provisional Transfer Order was entered. Any claim removed subsequent to the date of the relevant Provisional Transfer Order is still pending in the district to which it was originally removed.

On the other hand, it makes no sense to leave these subsequently removed claims ins procedural limbo due to an accident of timing. The Court will order that any Friction Product Claim now removed to federal court that would have been subject to one of the extant Provisional Transfer Orders had that removal been timely will also be provisionally transferred to this Court. The newly transferred plaintiffs may

feel aggrieved due to lack of time to oppose the plenary hearing on the transfer motions, particularly in light of the peremptory briefing schedule now in effect. To obviate this problem, the Court will adjourn *sine die* any briefing of plenary transfer of these late-removed claims.

For the foregoing reasons, the Court is satisfied that an Order clarifying its previous Provisional Transfer Orders and governing any future Provisional Transfer Orders will advance the orderly conduct of these proceedings.

An appropriate Order is attached.

/s/

ALFRED M. WOLIN, U.S.D.J.

APPENDIX H

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:
	: CHAPTER 11
FEDERAL-MOGUL GLOBAL, Inc. :	
	: BANKRUPTCY NO.
Debtor.	: 01-10578
	: (jointly administered)

ORDER 1) DENYING THE MOTIONS TO TRANSFER THE "FRICTION PRODUCTS CLAIMS" AND 2) REMANDING THE FRICTION PRODUCTS CLAIMS

This matter having been opened before the Court upon the several motions of parties, denominated in the prior Orders of the Court as the "Friction Products Defendants," to transfer to this District into the above-captioned proceedings the claims against the movants previously denominated "Friction Products Claims"; and the Court having previously granted this motion on a provisional basis and the Friction Products Claims having already been provisionally transferred to this Court subject to a plenary hearing on the motion to transfer; and the Court having previously given notice to the parties that it would consider arguments directed to subject matter jurisdiction, abstention and remand in ruling upon the movants' applications; and the Court having reviewed the submissions of counsel and heard oral argument; and for the reasons set forth on the record at the hearing on those motions today, as supplemented by a written Opinion to follow; and for good cause shown.

It is this 8th day of February 2002

ORDERED that the motions to transfer the Friction Products Claims are denied, and it is further

ORDERED that this Court lacks subject matter jurisdiction over the Friction Products Claims, and it is further

ORDERED that the Friction Products Claims are remanded to the state courts from which they were removed pursuant to 28 U.S.C. § 1447, and it is further

ORDERED that, in the alternative, the Friction Products Claims are remanded to the state courts from which they were removed pursuant to U.S.C. § 1452.

/s/

ALFRED M. WOLIN, U.S.D.J.

APPENDIX I

FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE: FEDERAL-MOGUL GLOBAL, INC., T&N LIMITED, *et al.*,	:	Chapter 11
	:	Case Nos. 01-10578, *et al.*[1]
	:	
Debtors.	:	**OPINION**

APPEARANCES:

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[1] See attached list.

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WOLIN, District Judge

This matter is opened before the Court upon motions pursuant to 28 U.S.C. § 157 to transfer to this Court certain personal injury claims against the movants pending in various United States District Courts based on allegations of exposure to asbestos in products designed to resist heat caused by friction (the "Friction Products Claims"). The movants are DaimlerChrysler Corporation ("Chrysler"), Ford Motor

Company ("Ford") and General Motors (collectively with the previously listed parties the "Big Three"), Honeywell International, Inc. ("Honeywell") and Volkswagen of America, Inc., Volkswagen AG, Mercedes-Benz USA, LLC, BMW North America, Inc., Volvo Cars North America, Inc., Rolls Royce Bentley Motor Cars, Inc. and Nissan North America, Inc. (the "International Auto Makers" and collectively with the other movants the "Friction Product Defendants"). The Court has reviewed the submissions and heard the argument of counsel on February 8, 2002. The Court ruled from the bench at that hearing that the transfer motions would be denied, that the Court lacked subject matter jurisdiction over the Friction Products Claims and that the Friction Product Claims would be remanded to the state courts from which they were originally removed. At the hearing the Court stated that it would supplement the record with a written Opinion on the motions. This is that Opinion.

BACKGROUND

Movant Friction Product Defendants were until recently parties in state court proceedings in most if not all of the states of the Union defending against allegations of personal injury tort and wrongful death. The claims allege that plaintiffs' injuries were caused by asbestos contained in the defendants' products, brake pads and other applications involving friction. The debtors, Federal-Mogul Global, Inc. and several of its subsidiaries, were co-defendants in many, but not all, of these suits when their chapter 11 petitions were filed on October 1, 2001.

As to the debtors, of course, the bankruptcy filing automatically stayed any state court proceedings. The Court is informed that, after that filing, plaintiffs around the country immediately began severing claims against the debtors or dismissing their claims against them altogether to permit their cases against the solvent parties to go forward. This aim was thwarted, however, by a massive campaign by the movants of removing claims against them to the local United States

District Courts on the theory that these claims were related to the above-captioned bankruptcy proceeding and thus within the bankruptcy jurisdiction of the federal courts. An illustrative though incidental fact demonstrating the procedural stakes at issue here is that case load statistics for each of the various districts immediately ballooned. Judge Pauley in the Southern District of New York received 1,500 new cases, and the larger and more asbestos-litigation intensive jurisdictions doubtless numbered new filings in the thousands.

Naturally plaintiffs did not remain supine through these events, but immediately fired off a corresponding number of motions to remand. Understandably, district judges around the country moved these motions to the tops of their calendars. The movants riposted on November 20, 2001, with a motion in the Delaware District Court wherein the bankruptcy was pending to transfer, wholesale, all of the removed claims in all of the different district courts to the District of Delaware. This motion was pending when, on November 27, 2001, this Court received the transfer of the above-captioned case and four other very large asbestos-related chapter 11 cases on November 27, 2001.[2]

The Court was thus confronted with the issues posed by these motions in its earliest days of supervising these bankruptcies. It was represented that various courts were in the process of ruling on the remand motions. Slip opinions forwarded to the Court's attention demonstrated that piecemeal remand and inconsistent retention of the Friction Product Claims was becoming a reality with each passing day.

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[2] The Court has over-simplified the chronology of events in the interest of narrative coherence. In fact, only the Big Three had progressed through removal to a motion to transfer by the time this Court assumed jurisdiction of the Federal-Mogul bankruptcy. Honeywell and the International Auto Makers followed the lead of the Big Three and began the process of removal and transfer later. Moreover, as subsequent events proved, the initial removal program was not completed all at once, and removal of new cases by each of the movants was ongoing through December.

Meanwhile, plaintiffs' counsel clamored that many of their clients were *in extremis* and not likely to live to see their day in court should the threshold jurisdictional decision be delayed. In fact, given that each adjudicative inconsistency and hardship was multiplied by the tremendous numbers of removed cases, confusion threatened to rule the day.

The movants prayed for relief in two parts. First, they sought an immediate and *ex parte* provisional transfer of the Friction Product Claims in order to protect them from piecemeal remand orders. Second, the movants proposed that the Court establish a method by which the large number of parties-at-interest might have their positions heard and that the Court then render a plenary decision on whether the Friction Product Claims would be transferred to this Court. This Court agreed, withdrew the reference to the Bankruptcy Court for the purposes of these motions, and charged the plaintiffs' bar to arrange among themselves who would brief and argue their opposition to the motions. The Court put the parties on notice that, in addition to the narrow issue of transfer pursuant to 28 U.S.C. § 157, the Court would also examine its subject matter jurisdiction and whether abstention or remand might be appropriate.

Events have not stood still despite the Court's best efforts to expedite disposition of the motions. As noted, some cases had already been remanded before the Court's Provisional Transfer Order could issue. Since that date, at least one District Court has refused to be bound by the Court's Provisional Transfer Order and made its own ruling that subject matter jurisdiction was lacking in the case before it. Another federal court reached the same result by interpreting the Provisional Transfer Order to apply only to Friction Product Claims removed before the date of the Order. Finally, the Fifth Circuit Court of Appeals recently denied an application for a stay of remand to the Texas state courts of thirty-seven lawsuits against another Federal-Mogul subsidiary, Garlock, Inc. The Fifth Circuit denied the application for a stay, finding no likelihood of

success in the proposition that Friction Product Claims against Garlock were related to the Federal-Mogul bankruptcy. *Arnold v. Garlock, Inc.*, 2001 WL 1669714 at *11 (5th Cir., Dec. 28, 2001).

Meanwhile, additional provisional transfer and transfer motions have been filed by other Friction Product Claims defendants. Rather than delay the briefing of the already pending motions, the Court granted provisional transfer as to some of these, adjourning without date their briefing. Other motions remain pending. The Court heard oral argument on the plenary motions to transfer on February 8, 2002. This Opinion constitutes the Court's plenary ruling on the motions to transfer the Friction Product Claims to this Court.

DISCUSSION

1. Subject Matter Jurisdiction

The bankruptcy removal statute is 28 U.S.C. § 1452(a):

> A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim under section 1334 of this title.

Section 1334(a) establishes subject matter jurisdiction in the United States District Courts for all cases under Title 11, but extends this power as well to "civil proceedings . . . arising in or related to cases under title 11." *See id.* § 1334(b). "Related to" is a term of art, and jurisdiction under the "related to" clause has been defined by the United States Supreme Court to include litigation of claims owned by the debtor's estate and, relevant here, litigation between third parties that has an effect on the estate. *Celotex Corp. v. Edwards,* 514 U.S. 300, 308 n.5 (1995).

The leading case in this area is our own Third Circuit's *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984). *Pacor* addressed whether an asbestos-related personal injury lawsuit against a non- debtor was related to the Johns-Manville chapter 11 proceeding on the ground that the non-debtor defendant had asserted a third-party claim of indemnification against Johns-Manville as the original manufacturer of the asbestos. While acknowledging the wide jurisdiction granted by Congress to federal bankruptcy courts to facilitate the administration of debtors' estates, the Court of Appeals noted that this jurisdiction is "not without limit." "Related to" jurisdiction still requires "some nexus between the 'related' civil proceeding and the title 11 case," the court explained. *Id.* at 994.

> The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether *the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy.* Thus, the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankruptcy estate.
>
> On the other hand, the mere fact that there may be common issues of fact between a civil proceeding and a controversy involving the bankruptcy estate does not bring the matter within the scope of section 1471(b) [now 1334(b)]. [J]urisdiction over nonbankruptcy controversies with third parties who are otherwise strangers to the civil proceeding and to the parent bankruptcy does not exist.

Id. at 994 (citations and internal quotation omitted)(emphasis and second alteration in original).

But a valid statement of principle does not necessarily produce a usable rule, and whether a controversy "could have any effect on the estate" will not always be self-evident. In

Pacor, a bare claim of common-law indemnity was not enough. The Court of Appeals found "at best it is a mere precursor to the potential third party claim for indemnification by Pacor against Manville" in which the debtor would be free to relitigate any issue necessary to the prior judgment. *Id.* at 995. On these facts, the *Pacor* court found that the "the bankruptcy estate could not be affected in any way until the Pacor-Manville third party action is actually brought and tried." *Id.*

The narrow holding of *Pacor* was that a mere common-law indemnity claim by a non-debtor co-defendant of a debtor will not "alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively)" in a way that "impacts upon the handling and administration of the bankruptcy estate." *Id.* at 994. That common facts would be litigated against the co-defendant did not matter, because no resolution of a factual issue would be binding on the debtor's estate.[3] The potential for a judgment against the debtor posed by the existence of a suit against the non-debtor was not only contingent (the non-debtor defendant might prevail) but it was indirect—any material effect on the estate would require yet another lawsuit. *Id.* at 995.

The United States Supreme Court's holding in *Celotex Corp. v. Edwards* is consistent with a narrow reading of *Pacor*, notwithstanding the contrary result on the jurisdictional issue. 514 U.S. 300 (1995). There asbestos claimants sought to execute on a *supersedeas* bond following an unsuccessful appeal by their judgment debtor. The bond was secured by cash owed to the debtor by the surety. Similarly, in *A.H.*

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[3] Actually, under New Jersey law and presumably other jurisdictions, a putative indemnitor will be bound by the underlying judgment provided the indemnitor was given an opportunity to be heard and defend. Implicit in *Pacor*'s rationale is that a debtor may not be prejudiced by its failure to defend a lawsuit against a third-party common-law indemnitee without *de facto* depriving the debtor of the benefit of the automatic stay of litigation against it.

Robins Co., the Fourth Circuit found that the bankruptcy court properly stayed litigation between products liability plaintiffs and non-debtor co-defendants named as additional insureds under the debtor's insurance policy. 828 F.2d 1023, 1024-26 (4th Cir. 1987), *cert. denied*, 485 U.S. 969 (1988). Yet another example is *Halper v. Halper*, 164 F.3d 830 (3d Cir. 1999), in which related-to jurisdiction was found over a dispute involving a guarantee by a non-debtor insider of the corporate debtor's obligation.

Each of *Celotex*, *A.H. Robins* and *Halper* can be explained at least in part by the recognition that they each involved property or rights belonging to the estate. In *Celotex*, it was the debtor's cash collateral, in *A.H. Robins* insurance proceeds, and in *Halper* a guarantee available as an alternative source of recovery for a creditor to take the pressure off the estate. This Court understands, of course, that related-to bankruptcy jurisdiction covers "more than simple proceedings involving the property of the debtor or the estate." *Celotex*, 514 U.S. at 308. The broader principle is that in each case the potential impact on the debtor's estate would have been direct with no intervening adjudication or joinder of issue necessary for judgment against the non-debtor to affect assets, re-prioritize creditors and thwart the bankruptcy court's administration of the estate.

Other courts, and the movants, have taken the language of *Pacor* and *Celotex* to indicate a broader but less choate concept of related-to bankruptcy jurisdiction. They cite the passage quoted above stating that bankruptcy jurisdiction over a proceeding depends upon "whether the outcome of that proceeding could conceivably have any effect on the estate being administered. . . ." *Pacor*, 743 F.2d at 994, *quoted in Celotex*, 514 U.S. at 308 n.6. This Court does not perceive that this formulation of the rule is necessarily inconsistent with the cases discussed immediately above—"conceivable" or not, the bottom line is whether resolution of an ostensibly unrelated claim will have an "effect on the estate."

As others have noted before, a broader understanding of "conceivable" as defining bankruptcy jurisdiction produces an unworkable rule and bizarre conclusions regarding Congressional intent in the bankruptcy jurisdiction statute. "The optimist may argue that anything is 'conceivable,' and practical definition of this term of art must be tempered with reasonableness." *In re Chargit, Inc.*, 81 B.R. 243, 247 (Bankr. S.D.N.Y. 1987). Judge Haden of the Southern District of West Virginia quoted the Seventh Circuit to these same litigants: "'common sense cautions against an open-ended interpretation of the "related to" language "in a universe where everything is related to everything else."'" *In re Asbestos Litig.*, 271 B.R. 118, 124 (S.D. W.Va. 2001) (quoting *Matter of FedPak Sys., Inc.*, 80 F.3d 207, 214 (7th Cir. 1996) (quoting G. Dunne, *The Bottomless Pit of Bankruptcy Jurisdiction,* 112 Banking L.J. 957 (Nov-Dec.1995))). Approving *Pacor,* the Supreme Court warned that "a bankruptcy court's 'related to' jurisdiction cannot be limitless." *Celotex,* 514 U.S. at 308. That pronouncement and the rule of *Pacor* as discussed above are doctrinally sound and, more to the point, binding on this Court.

The movants urge upon this Court the reasoning of the Sixth Circuit's opinion *In re Dow Corning Corp.*, 86 F.3d 482 (6th Cir. 1996), *cert. denied,* 519 U.S. 1071 (1997), which involved products liability co-defendants of a bankrupt manufacturer of silicone breast implants. The co-defendants removed the claims against them to the *Dow Corning* bankruptcy court on the theory that their rights of contribution or indemnification against the debtor under theories of joint and several liability made the claim against the non-debtors related to the bankruptcy. Disagreeing with the lower court, the Sixth Circuit found that "The potential for Dow Corning's being held liable to the non-debtors in claims for contribution or indemnification, or vice versa, suffices to establish a conceivable impact on the estate in bankruptcy." *Id.* at 493.

It may be that *Dow Corning* is impossible to reconcile with *Pacor,* which came to the opposite conclusion on a remarkably similar set of facts. There was no claim of contractual indemnification, guarantee or other theory in which a judgment against the solvent co-defendants would bind the *Dow Corning* estate. In fact, not all of the putative indemnitees had even asserted an express claim of indemnification against the debtor, but relied upon their claim of legal entitlement should they choose to press such a claim. On the other hand, an important distinction between *Dow Corning* and this case is the large number of non-debtor co-defendants poised to transfer into the Federal-Mogul proceeding, compared with the handful of non-debtor co-defendants involved in the *Dow Corning* case.

In any event, the Sixth Circuit found that "the claims currently pending against the non-debtors give rise to contingent claims against Dow Corning which unquestionably could ripen into fixed claims." 86 F.3d at 494. This is wrong, however, as *Pacor* explained. Claims against the non-debtor could *not* ripen into claims against the debtor, the debtor would have been bound by nothing in the prior suit, and a separate action would be necessary to convert the non-debtors' liability into a claim against the estate.

This Court is unconvinced by the *Dow Corning* panel's main point of distinction between that case and *Pacor.* The Sixth Circuit reasoned that *Pacor* contained only one claim, whereas in *Dow Corning* many thousands of plaintiffs were suing the non-debtors. This Court regards with misgiving the proposition that mere numbers of claims should prevail over articulable principles when it comes to defining federal subject matter jurisdiction. Moreover, for reasons explored more fully in the section below on abstention and remand, the number of claimants actually weighs against exerting bankruptcy jurisdiction in mass tort cases.

As the multiplicity of transfer motions now pending before this Court demonstrates, entire industries can be related by historical manufacturer/distributor relationships and each of the

players may have at least a colorable claim of common-law indemnification against each of the others. Movants contend that the scope of their motions may be limited by the fact that only cases in which debtors' products are involved will be affected. As all are aware, however, the Friction Products Claims involve plaintiffs whose alleged occupational exposure involves every manufacturer whose products who might potentially have been present at the plaintiff's workplace. In this far from uncommon situation, there is no principled limit to the theory of *Dow Corning*. Could Congress have intended that the bankruptcy of a single player would have automatic, nation-wide impact in which every manufacturer and distributor and all tens of thousands of injured parties are concentrated in a single reorganization proceeding?

If the question did not answer itself, then a straightforward reading of *Pacor* will reveal the Third Circuit's view on the matter. The possibility that the loser of an unrelated dispute might seek to recover its losses from the debtor does not make the dispute between non-debtors subject to the jurisdiction of the bankruptcy court. The Sixth Circuit's view to the contrary in *Dow Corning* has been described as a "remarkable extension of its [already] broad approach to relatedness." 1 William L. Norton, Jr., *Norton Bankr. Law & Prac.2d* § 4.44. To the extent that the reasoning of the Sixth and Third Circuits conflict, this Court must follow that of the Third.

An attempt to state the converse of the *Pacor* rule by categorically listing what facts will establish related-to jurisdiction will probably be doomed; the possible scenarios are too varied to predict. However, the holdings of the Third Circuit since *Pacor* have a common element. The facts of these later cases suggest a rule that related-to bankruptcy jurisdiction will not extend to a dispute between non-debtors unless that dispute, by itself, creates at least the logical possibility that the estate will be affected.

Thus, in *In re Marcus Hook Development Park, Inc.*, 943 F.2d 261 (3d Cir. 1991), inconsistent orders of the bankruptcy

court left post-confirmation purchasers of the debtor's real estate unclear as to the status of liens on the property. The Court of Appeals found related-to jurisdiction, because sorting the problem out would involve the continuing jurisdiction of the court and because disposition of the merits would affect the estate itself. *Id.* at 265. *CoreStates Bank, N.A. v. Huls Am., Inc.*, 176 F.3d 187 (3d Cir. 1999), concerned an inter-creditor subordination agreement and a post-petition payment of $600,000 to one creditor alleged to be inconsistent with that agreement. Related-to jurisdiction existed because, *inter alia,* the subordinated debtor relinquished a much larger secured claim in exchange for the $600,000 payment and thus the resolution of dispute would have affected the confirmability of the plan.

Movants' reliance on the term "conceivable" in *Pacor* as setting the conceptual boundaries of related-to bankruptcy jurisdiction confuses the issues of whether a third-party dispute will inevitably or automatically affect the bankruptcy and the issue of the causal proximity between the foreign dispute and the resulting effect on the bankruptcy. In *Pacor,* regardless of who won the underlying personal injury claim, nothing in the bankruptcy would change without the filing and adjudication of a separate claim for indemnification. Conversely, in *CoreStates,* it was not beyond the boundaries of conceivability that resolving the subordination dispute would have a substantial impact on the management of the bankruptcy, although it was at least equally conceivable that the creditors could have resolved it between themselves. However, had the dispute over the $600,000 payment ripened into litigation, whatever effect it would have had on the bankruptcy would have been direct and immediate, requiring no separate legal step to alter the relationships of the creditors and the financial affairs of the debtor.

Cases from other circuits follow the pattern. The *A.H. Robins Co.* case is the one most prominently cited by the parties. 788 F.2d 994. In addition to their status as additional

named insureds under the debtor's liability policy, each of the non-debtor co-defendants had rights of indemnification against the debtor, either by operation of state law as officers of the corporation, under the corporate bylaws, and/or by express agreement. *Id.* at 1007. The court found that the claims against the co-defendants were related to the bankruptcy (and that the injunction was properly granted), not only because the insurance policy was a key estate asset, but because the rights of indemnification were absolute and thus a judgment against the co- defendant indemnitee would effectively bind the debtor. *Id.* at 1008. The debtor's status as the real party at interest, potentially bound by the result of the non-debtor litigation, plainly established a sufficient nexus between suits against the individuals and the administration of the bankrupt's estate.

Other cases have produced the same result where key employees of the debtor were sued and where there was a right of indemnification. In *Belcufine v. Aloe,* 112 F.3d 633 (3d Cir. 1997), officers of the debtor were personally liable to the debtor's employees for pre-petition retirement and vacation benefits by operation of Pennsylvania law. Like the Fourth Circuit in *A.H. Robins,* the Third Circuit found related-to jurisdiction in the bankruptcy court based upon the debtor's officers' right of indemnification in the debtor's corporate bylaws. *Cf. McCartney v. Integra Nat'l Bank North,* 106 F.3d 506 (3d Cir. 1997) (automatic stay extended to foreclosure action against non-debtor corporation where bankrupt principal had guaranteed corporation's obligation).

Thus, to the extent hard rules may be drawn from the cases, it seems settled that suits against principal or key-personnel indemnitees of the debtor may be within the bankruptcy court's related-to jurisdiction. Of course, in addition to the right of indemnity, key personnel also present the additional fact that they will typically have incurred the underlying liability in the course of acting on the debtor's behalf. This and the fact that the indemnity right may be a function of corporate bylaws or statute suggest that the courts may have viewed litigation

against solvent corporate insiders as more inter-twined with the debtors' affairs, more certainly binding on the debtor, and therefore more directly affecting the rights of the debtor.

Where right of indemnification depends solely upon an agreement and lacks the additional element of the non-debtor being otherwise related to the debtor, the situation arguably lies closer to the boundary of related-to jurisdiction. In *A.H. Robins,* one of the indemnitees did not enjoy indemnitee status by virtue of the corporate bylaws, but only under an indemnification agreement. There, however, the question of the common insurance policy created a link decisively favoring bankruptcy jurisdiction. Likewise in *Halper,* even though the genesis of the argument for extending bankruptcy jurisdiction was the indemnification agreements, these agreements ran between family members and insiders of a closely held company. Thus in *Halper* too there existed substantial facts in addition to the agreement that justified extending related-to jurisdiction over the dispute.

The *Pacor* panel's discussion of *In re Brentano's,* 27 B.R. 90 (Bankr. S.D.N.Y. 1983), has been read to support the view that a contractual indemnity rights against the debtor will bring a suit against the indemnitee within the bankruptcy court's jurisdiction. 743 F.2d at 995. In *Brentano's,* a non-debtor guaranteed the debtor's obligations to its landlord and the guarantor received in return from the debtor its promise to indemnify for any liability incurred on the guarantee. Distinguishing that situation from the common-law indemnity claims raised in *Pacor,* the Court of Appeals offered two points of comparison: (1) that a judgment in favor of the landlord against the non-debtor guarantor would trigger the debtor's liability on the indemnity agreement, and (2) the landlord's claim against a guarantor of the estate would necessarily affect the landlord's status with respect to other creditors.

Pacor's discussion of *Brentano* was technically dictum, because in the end the Third Circuit found no related-to bankruptcy jurisdiction. However, appellate courts applying

Pacor have recognized that "the clear implication of the decision is that, if there had been a contract to indemnify, a contrary result would have been in order." *A.H. Robins,* 788 F.2d at 1001. The clarity of that implication notwithstanding, cases since *Pacor* have failed to endorse the proposition that *any* contract of indemnification will support an extension of related-to jurisdiction. As will be discussed, this failure has its own implications too, relevant to the motions at bar.

As to the vast majority of the claims that are the subject of the Court's provisional transfer orders, the movants have produced no evidence whatsoever of even a bare agreement to indemnify running between the debtors and the solvent co-defendants. Of the Big Three, Ford Motor Company and General Motors rely only on affidavits of employees that recall one or more of the debtors as a supplier of brake parts to them. Likewise, the International Automakers proffer an employee affidavit that stops well short of even suggesting that there was any promise to indemnify. Nor does Honeywell make a showing that an explicit agreement to indemnify existed.

The Court sees no justification to take the situation of these movants outside of the rule of *Pacor.* A judgment against them will not bind the debtors. No asset of the estate is threatened nor is any re-ordering of creditors in the offing. It is true that recovery by asbestos claimants against the movants may give rise to claims, indeed very substantial claims, against the debtors in the future. It is at that time, when the movants appear as creditors of the estate and the facts underlying the liability are adjudicated in the context of the bankruptcy, that the Friction Products Claims will affect the estate.

The Court perceives no distinction that would require a different result based upon the movants' contribution claim as opposed to the indemnification claim. In this context, the right of contribution is sufficiently analogous to the right of indemnification that it will not affect the estate in the manner contemplated by *Pacor.* The movants have presented no argument to the contrary. The Central District of Illinois

rejected the suggestion that indemnification and contribution claims should be treated differently for the purposes of related-to jurisdiction in *Nickum v. Brakegate, Ltd.*, 128 B.R. 648, 651 (C.D. Ill. 1991).

The claims against the movant Chrysler present a closer question. Chrysler submits purchase orders that appear to incorporate by reference several substantial documents setting forth standard terms and conditions to which those purchase orders were subject. These documents are all dated from the 1970's and are supported by the affidavit of a retired Chrysler purchasing and procurement employee. The terms and conditions manuals state at relevant part:

> Seller shall defend, indemnify and protect Purchaser against all claims, liabilities, losses and damages due to injury to or death of any person and damage to or loss of any property arising out of improper performance or negligent work under this order or arising out of allegedly defective material or workmanship in the goods or services provided by this order . . .

Of this clause, Judge Haden wrote:

> Considering Chrysler drafted the terms, which are extremely wide-ranging and generous to the drafter, which were not bargained for and are not present on the form presented to the suppliers (nor is any reference to them present on the form presented to Abex), the question whether this purported indemnity agreement would be determined to bind the suppliers is open and one not easily resolved. The Court is unwilling again to rest subject matter jurisdiction on this tenuous support.

In re Asbestos, 271 B.R. at 124.

This Court is in accord. To the extent that the validity of an indemnity agreement is in doubt, the directness between the third-party action and a judicial ruling that will affect the estate is attenuated. Moreover, as the jurisprudence shows, cases in which related-to jurisdiction is founded solely on an

indemnification agreement between otherwise unrelated parties are not the rule but the exception.

Even in the *Brentano's* case, the indemnitee was the largest unsecured creditor of the debtor. The indemnitee was also liable for eleven other guarantees it had made of the debtor's other lease obligations. 27 B.R. at 91. While the opinion is not explicit, plainly the guarantor/indemnitee was no stranger to the debtor. As noted, the Third Circuit's discussion of *Brentano's* was not necessary to its holding in *Pacor*. Even on its face, however, the Third Circuit's approval of *Brentano's* leaves open whether the Third Circuit would base a substantial extension of related-to jurisdiction on an indemnification clause such as the one relied upon by Chrysler.

Citing *Brentano's* only as a contrasting example, the *Pacor* panel did not disclose that the Southern District of New York had remanded the matter to the bankruptcy judge for further consideration of the jurisdictional issue. *In re Brentano's, Inc.*, 36 B.R. 90 (S.D.N.Y. 1984). The District Court opined that exercising jurisdiction would merely substitute the landlord's claim for what otherwise would be the indemnitee's claim against the estate. In light of the fact that claims against the non-debtor guarantor had settled claims on the other eleven guarantees since the bankruptcy court had ruled, the Southern District found it "especially apparent that a stay of the [remaining state litigation] . . . is not necessary to an efficient and effective disposition of the bankruptcy proceedings relating to Brentano's estate." *Id.* at 92.

Of course *Brentano's* can be read as *Pacor* did, to hold that an indemnification agreement may create bankruptcy jurisdiction over the underlying liability, with the possible proviso that the indemnitee be important to resolving the bankruptcy. On the other hand, that case may also be read to suggest that an indemnity agreement alone will not suffice. This is particularly true where other parties are similarly situated and their indemnity claims against the non-debtor will

ultimately be presented as unsecured claims by them against the estate.

Here Ford, General Motors, Honeywell and the International Automakers all derive their claims against the estate from the same products as Chrysler. For the reasons stated, there is no jurisdiction in this Court over these claims. Instead, all of these claims by movants other than Chrysler clearly must be raised against the debtor, if at all, as unsecured claims following the resolution of the underlying personal injury suits against them. Chrysler's claim that it alone is sufficiently central to the bankruptcy is severely diluted as a result, notwithstanding the indemnification language in its purchasing materials.

More fundamentally, the Court does not believe that a manufacturer may write its own invitation to the table of any of its suppliers' bankruptcies by including a boilerplate indemnification clause in its purchase orders. The routine nature of this kind of arrangement and lack of other connections between the parties makes this too thin a thread with which to pull Chrysler into the Federal-Mogul bankruptcy. Indeed, as more than one court has observed, movants' failure to actively pursue their alleged rights of indemnity against the debtors in the past undermines their claim now that these indemnity arrangements should be considered an important component of the administration of the bankruptcy. *See Garlock,* 2001 WL 1669714 at *11; *In re Asbestos,* 271 B.R. at 124 n. 8. Without attempting to state a blanket rule, in this case Chrysler's purchase order indemnification clause does not adequately distinguish its indemnification claim from that of all of the debtors' other customers with indemnification claims such that the claims against Chrysler are uniquely subject to the jurisdiction of this Court.

2. Abstention and Equitable Remand

As set forth in the preceding section, the Court finds that it lacks subject matter jurisdiction over the Friction Products Claims. This, of course, would stand as an adequate ground to

deny the transfer motion and to remand them to the state courts from which they were removed. However, the Court has acknowledged that subject matter jurisdiction is at least a closer question with respect to Chrysler. To remove any doubt, therefore, and for the sake of a complete record, the Court also finds as an alternative, independent ground that it would exercise its discretion to abstain from hearing the Friction Product Claims pursuant to 28 U.S.C. § 1334(c)(1) and remand them pursuant to 28 U.S.C. § 1452.

The Court pauses to address respondents' argument that abstention is mandatory under 28 U.S.C. § 1334(c)(2). This statute requires that the Court abstain where certain factors are present, including that the matter is considered "non-core." By definition, matters that are merely related to the bankruptcy proceeding are non-core proceedings. Movants counter that personal injury claims are not subject to mandatory abstention by operation of 28 U.S.C. § 157(b)(4), which carves out from the mandatory abstention statute those proceedings made non-core by operation of 28 U.S.C. § 157(b)(2)(B).

Proceedings defined as non-core by section 157(b)(2)(B) are claims involving "the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11." Respondents reply that the Friction Products Claims are not "claims against the estate," therefore not covered by section 157(b)(2)(B), and therefore not exempted from mandatory abstention by section 157(b)(4).

Movants respond that the Friction Products Claims are, in effect, claims against the bankrupts' estates because really it is "[d]ebtors' products that are on trial." Brief of Unsecured Creditors' Committee at 31. Of course, movants' entire position is premised on the idea that the debtors stand in their shoes by virtue of the movants' right of indemnity for their asbestos products liability. Thus, movants' attempt to avoid mandatory abstention must rise and fall on the same argument as their claim of related-to jurisdiction.

Of course, the Court has already rejected the proposition that the Friction Products Claims are related to the bankruptcy proceeding, on the grounds that there is an insufficient link between these claims against non-debtors and the debtors' estates. Even had the Court not already rejected the related-to jurisdictional argument, the argument against mandatory abstention under section 157 would be far from clear. Notwithstanding the undeniable overlap between the issues, it is a far step from finding that a claim against a non-debtor is related to a bankruptcy proceeding to finding that a claim against a non-debtor is actually a claim directly against the estate for the purposes of section 157(b)(2)(B).

The Court need not resolve this finer point of statutory interpretation, however. The Court will abstain in any event under the permissive abstention provision of 28 U.S.C. § 1334(c)(1) and remand the Friction Product Claims for equitable reasons under 28 U.S.C. § 1452(b). Indeed, the facts of this case leave no reasonable conclusion other than that the Court should exercise its discretion to abstain and to remand. Fairness, comity and preserving the integrity of this Court's management of the bankruptcy compel this result.

The statute lists as grounds for discretionary abstention the interest of justice, comity with the state courts and respect for state law. 28 U.S.C. § 1334(c)(1). The courts have developed a list of factors to be considered when deciding to abstain under section 1334(c)(1) and these are identical to those relevant to equitable remand. *See Balcor/Morristown Ltd. P'ship v. Vector Whippany Assocs.*, 181 B.R. 781, 788 (D. N.J. 1995); In re *Joshua Slocum, Ltd.*, 109 B.R. 101, 105 (E.D. Pa. 1989). While the list varies in the opinions, it generally includes:

(1) the effect on the efficient administration of the bankruptcy estate;

(2) the extent to which issues of state law predominate;

(3) the difficulty or unsettled nature of the applicable state law;

(4) whether there is an established state court proceeding on the same issues;

(5) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case;

(6) the existence of the right to a jury trial; and

(7) the likelihood that the bankruptcy proceeding represents forum-shopping by the petitioner.

In re Donington, Karcher, Salmond, Ronan & Rainone, P.A., 194 B.R. 750, 759-60 (D. N.J. 1996); *Balcor,* 181 B.R. at 793; *In re Foster,* 105 B.R. 746, 749-50 (Bankr. M.D. Ga. 1989) (listing a total of 12 factors).

It requires scant discussion to perceive that most if not all of these factors weigh very heavily in favor of abstention and remand. Previously stated, there is no principled end to the movants' argument that would prevent centralizing virtually all Friction Product asbestos litigation, nationwide, in this bankruptcy. Indeed, already large numbers of other manufacturers and other users of Friction Products have followed the movants' lead, removed claims pending against them in state courts, and filed motions to transfer them here. This Court is convinced that transfer of the movants' claims would be a disaster for the orderly management of this chapter 11 proceeding.

Moreover, looking pragmatically at the situation before it, the Court must recognize that there is no way that the benefit to the administration of the estate from unifying all of the Friction Products Claims in this chapter 11 case can ever be fully realized. First, while many Friction Products defendants have moved to transfer the claims against them to this Court, many have not. Thus, the problem of indemnification claims being raised against the estate will always be a factor and, in all likelihood, a major factor in the reorganization.

Second, as movants themselves have complained, a number of courts around the country were either not bound by this

Court's provisional transfer order as a function of timing, or failed to respect this Court's Order. Many of these cases have already been remanded to state court, further undermining the benefit to be gained from continuing to entertain those Friction Products Claims still subject to the Court's Provisional Order. Finally, in Texas and perhaps elsewhere, Friction Products Claimants have dismissed the debtor from their state actions, with prejudice. This, the Fifth Circuit holds, cuts off any right of indemnification against the debtor under Texas law. *Garlock*, 2001 WL 1669714.

Thus the reality of timing and the actions of other courts have made illusory much of the gain in efficiency and consistency of adjudication postulated by movants as grounds for the relief they seek. Whatever is decided in this Court, the movants will be forced to litigate claims based upon Federal-Mogul friction products in diverse jurisdictions. The estate will still encounter indemnification claims from former co-defendants against whom state-court judgments have been rendered. To the extent this result comes to pass, efficiency will be lost, not gained, by entertaining the Friction Products Claims in this Court, and the risk of inconsistent rulings exacerbated.

The Court acknowledges that movants postulate a plausible method for dealing with common issues of causation by means of common-issue summary judgment and trials under Federal Rule of Civil Procedure 42. But, setting aside for the moment whether this method adequately protects the constitutional and procedural rights of the personal injury claimants, whether it would succeed in streamlining the adjudication of claims is hotly and legitimately debated. Movants could well fail to establish a lack of genuine dispute over medical causation with respect to Friction Products. Depending on what the scientific evidence shows, it may well appear that causation issues are not sufficiently common between litigants to permit Rule 42 trials.

These issues must be either confronted or successfully negotiated with respect to the claims directly against the debtors. Any allure in movants' scheme depends on their ability successfully to avoid these pitfalls with respect to the transferred Friction Products Claims. This success is, to say the least, not assured. Yet, should movants fail to keep the proceedings to their script, all that the transfer would have accomplished would be an exponential increase in the already challenging task before the Court and the parties. If one adds to the mix all of the other would-be Friction Products transferees awaiting the outcome of this motion, the loom of chaos is palpable.

Nor is the transfer of Friction Products Claims cost-free, even assuming movants are successful in litigating common issues of causation and science. Because these cases have been removed, by definition a state court proceeding had previously been commenced. Many are well advanced. While sorting out the commercial interests of creditors and the reorganization of these corporate debtors, the Court will not forget that each of the tens of thousands of claims before it involves an individual with a personal injury claim. Respondents have argued convincingly that a appreciable number of these persons are presently very sick and some are terminally ill. While this Court intends to proceed with dispatch, it would be vain to conclude that claims will be resolved much more quickly here than in already-filed state court actions.

To give movants the benefit of proceeding under the bankruptcy code at the expense of these litigants would clearly pose hardship in individual cases. Some will expire who otherwise would have seen their cases tried. In some jurisdictions, rights will die with these disappointed litigants. As to all, solvent defendants will be missing from the ongoing state proceedings and the plaintiff's choice of forum will be lost as to them. Where, as here, the resulting benefit is so equivocal, the balance must tilt sharply toward abstention and remand.

Others of the factors are quickly analyzed. State law obviously predominates. The "degree of relatedness or remoteness" of the state proceeding has already been discussed in the preceding section of this Opinion. It suffices to say that, even if related-to jurisdiction existed over the Friction Product Claims, the degree of remoteness between them and the main bankruptcy case is substantial. Obviously, Friction Products claimants have a right to a jury trial of triable issues of fact.

Finally, the possibility that the movants are forum shopping is too obvious to be belabored. Some jurisdictions have been notoriously unfavorable to asbestos defendants. Movants understandably believe that they would gain an advantage if the claims against them were centralized in a federal court and they could gain the benefit of a channeling injunction under 11 U.S.C. § 524. The Court expresses no disapproval of these desires. Indeed, movants argue that, were they to bear fruit, the estate might also be the beneficiary.[4] These benefits of a change in forum do not, however, justify the affront to state and federal comity inherent in the removal of solvent defendants from ongoing state lawsuits into a federal bankruptcy.

One party has argued that equitable remand is impermissible without a case-by-case inquiry into the facts of each case. While the Court has no quarrel with this as a general proposition, the parties well know that such an inquiry would be prohibitively time-consuming here. Yet it is patently unfair for the movants to remove claims against them *en masse* and then claim that a patently impossible case-by-case procedure is mandatory before the claims may be remanded for equitable reasons. As the Friction Products Claims have been explained

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[4] The Court will not repeat the several obstacles that lie between these aspirations and reality. Assuming that centralizing of claims and extending the benefits of section 524 is legally possible, whether it may be accomplished for a sufficient percentage of the pending Friction Product Claims to constitute a real benefit to the estate is highly problematic from a practical standpoint.

to the Court by counsel, they contain sufficient common features that will permit the application of the equitable factors discussed here to be applied to each of them. It lessens the vitality of their own premise for movants to argue otherwise.

Thus the interests of justice and comity weigh heavily in favor of abstention and remand of the Friction Products Claims. Respect for state law is perhaps less implicated here, because a bankruptcy court must apply state law to claims before it in any event and the state law questions posed by the Friction Products Claims will not be especially complex or difficult. Nonetheless, for the reasons stated, the Court finds that the other factors weigh so strongly that the Court will use its discretion to abstain from exercising jurisdiction over the Friction Products claims and they will be remanded, pursuant to 28 U.S.C. §§ 1334(c)(1) and 1452(b).

Recognizing that it is rare for a District Court in one state to remand a matter to the state courts of another state, (let alone to the courts of all of the different states), and although the parties did not raise this issue, the Court will address this last aspect of its Order. First, it appears plain to the Court that the question is really just one of inter-jurisdictional bookkeeping. Either this Court will remand directly to the states, or it will vacate its provisional transfer Order and send the cases back to the several districts from which they came. If this Court were to choose the latter course, each of the other districts would then be faced with the task of either applying the ruling of this Court and issuing an order of remand, or addressing for themselves whether to remand or abstain.

The logic of the statutory structure suggests that this latter course, with its attendant waste of judicial energy, is unnecessary. It is common ground that 28 U.S.C. § 157 permits transfer between districts of personal injury claims

related to a bankruptcy case.[5] It is fundamental that this Court has the right, indeed the duty, to inquire into its subject matter jurisdiction at any time it appears in doubt. Finally, 28 U.S.C. § 1452 grants the Court the discretion to remand, without specifying to where. Yet, remand, by definition, must return the remanded matter to the court from which it was removed. *Petrofsky v. ARA Group, Inc.,* 878 F. Supp. 85 (S.D. Tex. 1995).

It is also true, however, that section 1452 begins with the phrase "[t]he court to which such claim or cause of action is removed" has the power of remand. Of course, this Court stands in the shoes of the transferor district for all other purposes; it is not clear what interest would be served by excepting the power of remand from the others conferred by the transfer. Moreover, *ex hypothesi,* this Court and all federal courts lack subject matter jurisdiction over the claims at issue. It would be nonsensical for this court, lacking subject matter jurisdiction, to transfer the matter back to the transferor districts, which also lack subject matter jurisdiction, so that they may be remanded from the local federal courthouse. Finally, limiting the power of remand only to the original district of removal would create an imbalance between the flexible powers of transferor and transferee courts and present all too tempting a motive for potential forum shoppers.

The Court has been informed that many state court systems maintain *in extremis* dockets of Friction Products and other asbestos claims for plaintiffs who may die before trial if their cases are not reached promptly. It would ill-behoove the

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[5] Prior to the Court's ruling, respondents may well have wished to argue that this Court lacked power to transfer the claims to itself out of other districts. Having won the day in this forum, the Court presumes that this wish of respondents has abated. Of course, movants cannot argue that this Court lacks the power to do that which they were previously successful in persuading this Court to do.

federal courts, having decided that both that jurisdiction is lacking and that equitable factors require remand, to delay any further these *in extremis* litigants by a pointless additional round of re-transfer to the several districts and further proceedings on remand. This Court is satisfied that its inherent powers, those "necessary to the exercise of all others," *In re Prudential Sales Practices Litig. Agent Actions,* ___ F.3d ___, 2002 WL 90847 (3d Cir. Jan. 24, 2002) (quoting *Fellheimer, Eichen & Braverman, P. C., v. Charter Technologies, Inc.,* 57 F.3d 1215, 1224 (3d Cir. 1995)) (further quotations omitted), resolve any lingering questions in favor of substance over form and in favor of immediate relief over punctilio. Therefore, the Court has remanded all of the Friction Products Claims directly to the several state courts from which they were removed.

CONCLUSION

For the reasons set forth above, the Court finds that it lacks subject matter jurisdiction over the Friction Products Claims pending before it pursuant to the Court's Provisional Transfer Orders. In the alternative, the Court will exercise its discretion to abstain from exercising jurisdiction over the Friction Products Claims and will remand them to the state courts from which they were removed. The motion to finally transfer these claims to this Court will be denied.

The Order corresponding to the rulings of this Opinion has already been issued.

Dated: February 15, 2002

/s/
ALFRED M. WOLIN, U.S.D.J.

APPENDIX J

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted February 6, 2002
Decided February 15, 2002

Before

Hon. DANIEL A. MANION, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge
Hon. DIANE P. WOOD, Circuit Judge

IN RE: GENERAL MOTORS CORPORATION and DAIMLERCHRYSLER CORPORATION, Petitioners.	]	Petition for a Writ of Mandamus.
No. 02-1273	]	No. 01 C 794
	]	G. Patrick Murphy, Chief Judge

The following is before the court: **PETITION FOR WRIT OF MANDAMUS,** filed on February 4, 2002, by counsel for the petitioners.

The petitioners, General Motors and DaimlerChrysler, ask this court to vacate the order issued by Chief Judge Murphy on January 29, 2002, remanding to Illinois state court 155 personal injury and wrongful death cases. They argue that Chief Judge Murphy lacked the authority to enter the remand order because the cases already had been transferred to the United States District Court for the District of Delaware pursuant to 28

U.S.C. § 157(b)(5), for consideration with a Chapter 11 bankruptcy case pending before the court.

On December 10, 2001, Judge Wolin, sitting by designation in the District of Delaware, entered an order provisionally transferring the cases to the District of Delaware. Judge Wolin also scheduled a hearing to consider the pending motions to transfer and to determine whether federal subject matter jurisdiction exists over the cases. As the Fourth Circuit has acknowledged, a district court can enter a provisional transfer fixing venue before it and then conduct the necessary inquiries before entering a final transfer order. *A.H. Robins v. Piccinin*, 788 F.2d 994, 1015-16 (4th Cir. 1986). Such a provisional order brings all the pending suits before the transferee court "for the time being." *Id.* at 1015.

The December 10th provisional transfer order effectively transferred the cases pending in the Southern District of Illinois to the District of Delaware. The order contemplated an immediate transfer, and no further action was necessary to effectuate the transfer. Accordingly, the Southern District of Illinois no longer had jurisdiction over the cases, and Chief Judge Murphy lacked the authority to remand the cases to Illinois state court. The remand order therefore must be recalled as improvidently granted. *See In re Continental Casualty Co.*, 29 F.3d 292, 295 (7th Cir. 1994).

We not that on February 8, 2002, Judge Wolin conducted the contemplated hearing and, like Chief Judge Murphy, determined that the federal courts lack subject matter jurisdiction over the cases. Judge Wolin ordered the cases remanded to the state courts from which they were removed. Because the cases at issue were already before the District of Delaware, the cases are now subject to Judge Wolin's February 8th remand order. The petitioners, however, have appealed the February 8th order, and the Third Circuit has temporarily stayed the remand order.

For the foregoing reasons, **IT IS ORDERED** that the petition for writ of mandamus is **GRANTED**. Chief Judge Murphy shall recall his remand. The cases were transferred to the District of Delaware on December 10, 2001, and are among the cases currently pending before the Third Circuit.

APPENDIX K

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 02-10029, 02-10034, 02-10035
02-10036, 02-10037

In Re: DAIMLERCHRYSLER CORPORATION; GENERAL MOTORS CORPORATION; FORD MOTOR COMPANY,

Petitioners.

Petition for Writ of Mandamus to the United State District Court for the Northern District of Texas, Dallas Division

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Before JOLLY, JONES, and STEWART, Circuit Judges.

BY THE COURT:

DaimlerChrysler Corporation, General Motors Corporation, and Ford Motor Company ("the Auto Makers"), have filed petitions for writs of mandamus in these five related cases, challenging the orders of the district court remanding these cases to state court. For the following reasons, we GRANT the mandamus petitions. We also DENY the motion for sanctions filed by plaintiffs Dunn and Maillot.

I

The plaintiffs in these five related cases filed suit in Texas state court against one or more of the Auto Makers, as well as other defendants, alleging they suffered injuries caused by asbestos contained in brake pads of the vehicles sold by the Auto Makers. Federal-Mogul Global, Inc. ("Federal-Mogul"),

was supplier of asbestos to the Auto Makers, and a defendant in the *Means* case (No. 02-10034). One of Federal-Mogul's subsidiaries, Garlock, Inc., was a defendant in the *Munoz* case (No. 02-10037). On October 1, 2001, Federal-Mogul filed for Chapter 11 Bankruptcy in the United States District Court for the District of Delaware ("Delaware"). On November 20, the Auto Makers filed a motion in Delaware to transfer to Delaware all claims against them relating to asbestos in car friction products, pursuant to 28 U.S.C. § 157(b)(5).[1] The Auto Makers removed to federal court two of the cases that are the subject of this mandamus petition, *Swan* (No. 02-10035) and *Munoz* (No. 02-10037), on December 4 and 5, respectively, on the ground that they were related to the bankruptcy proceeding.[2] On December 10, the district judge in Delaware entered an order under § 157(b)(5) provisionally transferring to Delaware all cases pending in federal district courts against the Auto Makers arising out of "friction products" cases in which the Auto Makers contended they had a right to indemnification from Federal-Mogul in the bankruptcy proceeding. The other three cases that are the subject of this petition—*Means* (No. 02-10034), *Malliot* (No. 02-10036), and *Dunn* (No. 02-

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[1] This section provides that: "The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in which the claim arose, as determined by the district court in which the bankruptcy case is pending."

[2] Cases that are related to bankruptcy cases filed under Title 11 can be removed to district court. 28 U.S.C. § 1452(a)("A party may remove any claim in a civil action . . . to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim under section 1134 of this title.") Title 28 U.S.C. § 1334(a) provides that "the district courts shall have original and exclusive jurisdiction of all cases under title 11." Additionally, "[n]otwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under Title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b).

10029)—were not removed to federal court until December 21, 27 and 28. On January 3, 2002, the district court in Delaware provisionally transferred to itself any cases removed to federal court since December 10 that would have been provisionally transferred under the original order. On January 3, the district court in Texas purported to remand these five cases to state court for a lack of subject matter jurisdiction. The Auto Makers moved the Texas district court for reconsideration on January 7, but were informed on January 8 by the clerk of the Northern District of Texas that the remand notices already had been mailed to the state courts. The Auto Makers then filed these mandamus petitions.

II

Although the language of § 157(b)(5) does not specifically provide for "provisional" transfers, a number of courts have found provisional transfer under § 157(b)(5) to be appropriate. The Eastern District of Michigan approved a recommendation by the bankruptcy court to provisionally transfer a number of personal injury cases pending against the debtor, subject to a final determination to be made later. *In re: Dow Corning Corp.*, 1995 WL 495978 (Bankr. E.D. Mich. 1995). *In re: A.H. Robins*, 788 F.2d 994, 1015-16 (4th Cir. 1986), the Fourth Circuit made clear that the district court's ruling under § 157(b)(5) bringing all pending suits against the debtor before the district court sitting in bankruptcy was "conditional," subject to giving adequate notice and an opportunity to file motions to all claimants. The Seventh Circuit relied on *Robins* in holding that a district court in the Southern District of Illinois was bound by the Delaware court's provisional transfer order (the same one involved in the five cases before us) and that the cases had been "effectively transferred" to Delaware. *In re: General Motors Corp. and DaimlerChrysler Corp.*, No. 02-1273 (7th Cir. Feb. 15, 2002). The Seventh Circuit therefore granted the petition for a writ of mandamus and ordered the district court to recall its remand of the cases to Illinois state court. *Id.*

Additionally, the Supreme Court has made clear in *Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995), that one federal court is bound by the proper orders of another federal court. Specifically, in *Celotex* the Court found that a federal district court in which the Edwards has been awarded a judgment and in which Celotex had posted a supersedeas bond (with Northbrook Property and Casualty Insurance Company serving as the surety on the bond), was bound by an injunction entered by a separate bankruptcy court under 11 U.S.C. § 105(a) staying all proceedings involving Celotex. *Id.* The Edwards should have challenged the injunction in the bankruptcy court, and if they lost appealed it to the district court where the bankruptcy judge sat, etc., rather than collaterally attacking the injunction in another court in another proceeding. *Id.*

Considering the principles articulated by the Supreme Court in *Celotex*, and the Seventh Circuit's recent opinion on the same issue presented to us, we find that the writs of mandamus should be granted in this case. We recognize that a writ of mandamus is an "extraordinary remedy." *Adams v. Georgia Gulf Corp.*, 237 F.3d 538, 542 (5th Cir. 2001). This court has stated that it will grant a writ of mandamus "only if the petitioner can show its right to the writ is clear and indisputable. Mandamus is appropriate when the trial court has exceeded its jurisdiction or has declined to exercise it, or when the trial court has so clearly and indisputably abused its discretion as to compel prompt intervention by the appellate court." *In re Dresser Industries, Inc.*, 972 F.2d 540, 542-43 (5th Cir. 1992) (citations omitted). Because the Delaware court had provisionally transferred these cases to itself and the district court in Texas was bound by this transfer order, the district court here did not have jurisdiction to remand these cases. Therefore, the district court exceeded its jurisdiction in remanding these cases, and its remand was without any effect.

We therefore GRANT the petitions for writs of mandamus in these cases. The district court is directed to recall its remand orders. These cases were transferred to Delaware by the

December 10, 2001 and January 3, 2002 remand orders, and are currently pending before the Third Circuit.[3]

Because we find these mandamus petitions to be meritorious, the motion by plaintiffs Dunn and Malliot for sanctions is DENIED.[4]

Mandamus GRANTED; sanctions DENIED.

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[3] We note that on February 8, 2002, the Delaware court found that it did not have subject matter jurisdiction over the transferred cases and ordered them remanded to the state courts from which they were removed. Because these cases had been transferred to Delaware, they are subject to the Delaware court's order which is on appeal to the Third Circuit. The Third Circuit has stayed the Delaware court's later order pending appeal.

[4] The plaintiffs' motion for sanctions was based in part on the Auto Makers' allegations that the district judge, Judge Kendall, was biased in these cases. We find no merit to these allegations. Instead, we deny the motion for sanctions simply because we find these petitions to be meritorious.

APPENDIX L

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE: FEDERAL MOGUL GLOBAL, INC. DaimlerChrysler Corp.; Ford Motor Company; General Motors Corporation, Appellants in No. 02-1426 U.S. Court of Appeals for the Third Circuit	:	
IN RE: FEDERAL MOGUL GLOBAL, INC. Hennessey Industries, Inc. Appellant in No. 02-1491 U.S. Court of Appeals for the Third Circuit	:	**ORDER**
IN RE: FEDERAL MOGUL GLOBAL, INC. MG Rover Group, Inc.; Nissan North America, Inc.; Volkswagen AG; Mercedes-Benz USA, LLC; BMW North America, Inc.; Volvo Cars North America, Inc.; Harley-Davidson Motor Company Group, Inc., Appellants in No. 02-1492 U.S. Court of Appeals for the Third Circuit	:	

IN RE: FEDERAL MOGUL GLOBAL, INC.,

Salvo Auto Parts; Holman Enterprises, Inc.; B.F. Goodrich, Inc.,

Appellants in No. 02-1528
U.S. Court of Appeals for the Third Circuit

IN RE: FEDERAL MOGUL GLOBAL, INC.

Honeywell International, Inc.,

Appellant in No. 02-1652
U.S. Court of Appeals for the Third Circuit

IN RE: FEDERAL MOGUL GLOBAL, INC.

British Motor Cars Distributors, Inc.,

Appellant in No. 02-1664
U.S. Court of Appeals for the Third Circuit

IN RE: FEDERAL MOGUL GLOBAL, INC.	:
Official Committee of Unsecured Creditors,	:
Appellant in No. 02-1688 U.S. Court of Appeals for the Third Circuit	:

IN RE: FEDERAL MOGUL GLOBAL, INC.	:
International Truck and Engine Corp.,	:
Appellant in No. 02-1741 U.S. Court of Appeals for the Third Circuit	:

On July 31, 2002, the United States Court of Appeals for the Third Circuit determined that it did not have jurisdiction to review the decisions of the district court that denied the transfer of tens of thousands of asbestos-related tort claims, as well as its order to remand those tort claims to the state courts where they were originally filed. Because the Court of Appeals mandate has likewise issued, it is now appropriate for this Court to remand all of the friction product cases transferred to the United States District Court for the District of Delaware to the state courts where they were originally filed. Therefore,

It is on this 6th day of August, 2002

ORDERED that the cases listed on the attached Exhibit A are remanded to the state courts where they were originally filed; and it is further

ORDERED that a copy of the mandate issued by the Court of Appeals is attached hereto as Exhibit B.

/s/

ALFRED M. WOLIN, U.S.D.J.

No. 02-661

Supreme Court, U.S.
FILED
DEC 2 2002
CLERK

In the Supreme Court of the United States

DAIMLERCHRYSLER CORP., *et al.*,
Petitioners,

v.

OFFICIAL COMMITTEE OF ASBESTOS CLAIMANTS OF FEDERAL-MOGUL GLOBAL, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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QUESTION PRESENTED

Whether the court of appeals correctly determined that 28 U.S.C. § 1447(d) deprived it of appellate jurisdiction of the district court's order remanding personal injury claims to the state courts from which they were removed.

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In the Supreme Court of the United States

No. 02-661

DAIMLERCHRYSLER CORP., *et al.*,

Petitioners,

v.

OFFICIAL COMMITTEE OF ASBESTOS CLAIMANTS OF FEDERAL-MOGUL GLOBAL, INC., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-42a) is reported at 300 F.3d 368. The opinion of the district court (Pet. App. 58a-85a) is reported at 282 B.R. 301.

JURISDICTION

The judgment of the court of appeals was entered on July 31, 2002. Pet App. 1a, 45a. The petition for a writ of certiorari was filed on October 29, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

1. A Chapter 11 bankruptcy case involving Federal-Mogul Global and its affiliates ("the Debtors") was filed in the District of Delaware on October 1, 2001. Pet. App. 10a. At the time of filing, the Debtors were co-defendants with

numerous other defendants, including petitioners, in state-court asbestos actions pending throughout the country. When the Debtors filed for bankruptcy, litigation against them was automatically stayed under 11 U.S.C. § 362(a). Many asbestos plaintiffs thereupon severed or dismissed their claims against the Debtors in order to permit their state-court cases against other defendants to go forward. Pet. App. 10a. "This aim was thwarted, however, by a massive campaign by [defendants] of removing claims against them to the local United States District Courts on the theory that these claims were related to" the Debtors' bankruptcy within the meaning of 28 U.S.C. § 1334(b). Pet. App. 60a-61a. The assertion of "related to" subject-matter jurisdiction in the federal courts was premised on allegations that some defendants may have used or installed the Debtors' asbestos-containing brake products, and that, if adjudged liable to plaintiffs, they might have claims for contribution or indemnification against the Debtors at some future time.

On November 20, 2001, petitioners DaimlerChrysler Corporation, Ford Motor Company, and General Motors Corporation (collectively, "the automakers") filed a motion seeking to transfer to the District of Delaware tens of thousands of state-court asbestos claims pending against them nationwide. Pet. App. 61a. Some of these claims had been removed to the local federal district courts, whereas other claims were still pending in state courts. *See* Pet. App. 10a, 53a-55a. The automakers requested that the Delaware District Court immediately issue a provisional transfer order transferring the claims to itself for purposes of determining whether federal subject-matter jurisdiction existed. Pet. App. 11a, 62a. In the wake of the automakers' motion, approximately 30 of the Debtors' other co-defendants filed or joined in motions asking that asbestos suits against them also be transferred to the District of Delaware. *See* Pet. App. 11a.

The Debtors did not join in, or support, these transfer motions.

On November 27, 2001, Chief Judge Becker assigned Judge Alfred Wolin to hold court in the District of Delaware "to complete unfinished business" in the Federal-Mogul bankruptcy and four other major bankruptcies that likewise involve asbestos claims. Pet. App. 47a-48a. On December 10, 2001, Judge Wolin issued an order partially withdrawing the bankruptcy reference in the Federal-Mogul case, *i.e.*, with respect to "Friction Products Claims" as to which "the movants contend that they have a right of indemnification against the [D]ebtors." Pet. App. 49a. He also granted the automakers' *ex parte* motion for a provisional transfer, ordering that claims previously removed to federal district courts "are hereby provisionally transferred to this Court subject to further order of the Court." Pet. App. 50a.

2. On February 8, 2002, Judge Wolin held a hearing on the motions to transfer. After the close of arguments, he issued his oral rulings, which were incorporated in a written order later the same day. *See* Pet. App. 63a, 56a-57a. He first held that the federal district courts lack subject-matter jurisdiction of the provisionally-transferred claims, concluding that state-court tort litigation against the automakers was not "related to" the Debtors' bankruptcy within the meaning of 28 U.S.C. § 1334(b). He accordingly ordered that "the Friction Products Claims are remanded to the state courts from which they were removed pursuant to 28 U.S.C. § 1447." Pet. App. 57a. Section 1447(c), governing procedure after a case is removed from state court, provides: "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."

As an alternative ground, the district court ruled that it would equitably abstain, pursuant to 28 U.S.C. § 1334(c)(1),

from exercising jurisdiction over the Friction Product Claims. Judge Wolin's order does not explicitly recite his oral ruling concerning equitable abstention. However, that holding is presupposed in his order "that, in the alternative, the Friction Products Claims are remanded to the state courts from which they were removed pursuant to 28 U.S.C. § 1452." Pet. App. 57a. Section 1452(b) authorizes the district court to remand a removed claim "on any equitable ground." Having concluded that the federal district courts lack subject-matter jurisdiction, or alternatively that abstention was appropriate, Judge Wolin denied, on a final basis, the motions to transfer that he had previously granted on a provisional basis. Pet. App. 56a. The automakers and other movants immediately noticed appeals from the district court's February 8 order. C.A. App. 1-10.

3. On February 15, 2002, the district court issued its written opinion. Pet. App. 58a-85a. On the issue of subject-matter jurisdiction, the opinion relies principally on the Third Circuit's decision in *Pacor, Inc., v. Higgins*, 743 F.2d 984 (3d Cir. 1984), and on this Court's decision in *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995). *See* Pet. App. 63a-65a. As Judge Wolin observed, this Court in *Celotex* cautioned that "related to" jurisdiction, while broad, "cannot be limitless," and it explicitly approved the jurisdictional analysis set forth in *Pacor*. *See* Pet. App. 67a (quoting *Celotex*, 514 U.S. at 308 & n.6). In *Pacor*, the Third Circuit held that "a mere common-law indemnity claim by a non-debtor co-defendant of a debtor" was not enough to give a bankruptcy court "related to" jurisdiction over litigation between solvent third parties unaffiliated with the debtor. Pet. App. 65a. Such extrinsic litigation, Judge Wolin explained, would be at best "'a mere precursor to the potential third party claim for indemnification by [the indemnitee] against [the debtor],' in which the debtor would be free to relitigate any issue necessary to the prior

judgment." Pet. App. 65a (quoting *Pacor*, 743 F.2d at 995). Thus, not only would an indemnitee's claim against the debtor be "contingent," but any impact on the debtor would be "indirect," since "any material effect on the estate would require yet another lawsuit." Pet. App. 65a.

Judge Wolin noted the Third Circuit's suggestion in *Pacor* that the result there might have been different if the debtor had executed an express contractual agreement to indemnify the third party. Pet. App. 72a (citing *Pacor*, 743 F.2d at 995). Reviewing the judicial precedents since *Pacor*, however, the district court concluded that "cases in which related-to jurisdiction is founded solely on an indemnification agreement between otherwise unrelated parties are not the rule but the exception." Pet. App. 74a-75a. In most of the precedents, the indemnified parties were closely affiliated with the debtor, *e.g.*, its key employees, officers, directors, corporate affiliates, or family members. *See* Pet. App. 70a-72a. Where litigation against corporate insiders is concerned, the court noted that "related to" jurisdiction may be justified not only because the debtor's by-laws grant these individuals indemnification rights, but also because insiders "will typically have incurred the underlying liability in the course of acting on the debtor's behalf." Pet. App. 71a.

Turning to the case at hand, Judge Wolin found: "As to the vast majority of the claims that are the subject of the Court's provisional transfer orders, [petitioners] have produced no evidence whatsoever of even a bare agreement to indemnify running between the [D]ebtors and the solvent co-defendants." Pet. App. 73a. Petitioners Ford and General Motors "rel[ied] only on affidavits of employees that recall one or more of the [D]ebtors as a supplier of brake parts to them," but these affidavits "stop[ped] well short of even suggesting that there was any promise to indemnify." *Ibid.*

In the absence of any agreement to indemnify, the district court could see "no justification to take the situation of these [petitioners] outside of the rule of *Pacor*." *Ibid.*

Judge Wolin believed that "[t]he claims against [appellant] Chrysler present a closer question," because it, unlike the other automakers, had produced documents that allegedly constituted an agreement by the Debtors to indemnify it. Pet. App. 74a. These documents consisted of Chrysler purchase orders, which appeared to incorporate by reference Chrysler office manuals, which in turn set forth "standard terms and conditions to which those purchase orders were subject," including a "boilerplate indemnification clause." Pet. App. 74a, 76a. However, Chrysler produced no evidence that Federal-Mogul had acceded to, or even been shown, this indemnification clause, or that Chrysler had previously sought to enforce it. *See* Pet. App. 74a, 76a. Under these circumstances, the district court rejected the notion "that a manufacturer may write its own invitation to the table of any of its suppliers' bankruptcies by including a boilerplate indemnification clause in its purchase orders." Pet. App. 76a. Judge Wolin noted that this holding was supported by a recent decision of the Fifth Circuit, which denied a stay on substantially identical facts after "finding no likelihood of success in the proposition that Friction Product Claims against [another co-defendant of the Debtors] were related to the Federal-Mogul bankruptcy." Pet. App. 62a-63a, 76a (citing *Arnold v. Garlock*, 278 F.3d 426 (5th Cir. 2001)).

Judge Wolin recognized that his holding as to lack of subject-matter jurisdiction would, by itself, "stand as an adequate ground to deny the transfer motion and remand [the claims] to the state courts from which they were removed." Pet. App. 76a-77a. However, "for the sake of a complete record," the district court also held, "as an alternative,

independent ground" for its judgment, "that it would exercise its discretion to abstain from hearing the [claims] pursuant to 28 U.S.C. § 1334(c)(1)." Pet. App. 77a. The court concluded that "the facts of this case leave no reasonable conclusion other than that [it] should exercise its discretion to abstain," finding that "[f]airness, comity, and preserving the integrity of the Court's management of the bankruptcy compel this result." Pet. App. 78a. Judge Wolin discerned "no principled end to [petitioners'] argument that would prevent centralizing virtually all Friction Product asbestos litigation, nationwide, in this bankruptcy." Pet. App. 79a. He accordingly was "convinced that transfer of [petitioners'] claims would be a disaster for the orderly management of this chapter 11 proceeding." Pet. App. 79a. The court also found that "the possibility that [petitioners] are forum shopping is too obvious to be belabored." Pet. App. 82a.

In exercising his discretion to abstain, Judge Wolin considered petitioners' proposal of a "global" hearing to resolve "common issues of causation and science" under the evidentiary standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *See* Pet. App. 80a-82a. Whether such a procedure "would succeed in streamlining the adjudication of claims" was, in the district court's view, "hotly and legitimately debated." Pet. App. 80a. Nor was it clear that such a procedure could "adequately protect the constitutional and procedural rights of the personal injury claimants." *Ibid.* After considering the viability of appellants' proposed "global *Daubert* proceeding" and the harm that delay would inflict on personal injury plaintiffs, Judge Wolin concluded: "Where, as here, the resulting benefit is so equivocal, the balance must tilt sharply toward abstention and remand." Pet. App. 81a.

4. On appeal from the district court's order, appellees (respondents here) were four groups of Friction Products plaintiffs, including the Official Committee of Asbestos Claimants, which was appointed by the U.S. Trustee to represent the interests of asbestos claimants in the Federal-Mogul bankruptcy. *See* Pet. App. 18a.[1] Respondents contended that the appeals should be dismissed for lack of appellate jurisdiction under 28 U.S.C. § 1447(d), which provides that "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." The automakers contended that no valid remand order existed; that they sought review instead of the district court's denial of their transfer motions; that orders denying a change in venue are reviewable either on direct appeal or by way of mandamus; and that the district court's holdings as to subject-matter jurisdiction and abstention should be reversed on the merits. The court of appeals held that it "d[id] not have jurisdiction to review the decisions of the District Court" and that, "insofar as we can consider [petitioners'] appeal construing it as a petition for a writ of mandamus, that petition is denied." Pet. App. 42a.

The court of appeals did not decide whether the district court's order should be regarded as an order remanding the claims to the state courts or an order denying transfer from the federal district courts. Instead, the court stated that it would "follow the prudent course and consider [its] jurisdiction under each construction." Pet. App. 19a.

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[1] Two other groups of respondents – the Unofficial Committee of Select Asbestos Claimants and the Waters & Kraus Claimants – appeared in the district court and the court of appeals to advance additional arguments concerning abstention and jurisdiction. Neither court found it necessary to reach these alternative arguments. Both groups join in this brief and respectfully preserve their additional arguments should those arguments later become relevant.

Addressing the "transfer" construction first, the court cited the "well-established rule" that orders granting or denying a change in venue are not immediately appealable, and that "[m]andamus is * * * the appropriate mechanism for reviewing an allegedly improper transfer order." Pet. App. 19a-20a (citing *In re United States*, 273 F.3d 380, 385 (3d Cir. 2001)). The basis for Judge Wolin's denial of transfer, the court noted, was his holding that "related to" jurisdiction under 28 U.S.C. § 1334(b) did not exist. The Third Circuit concluded that this holding represented a straightforward application of its precedent in *Pacor*, which "clearly remains good law in this circuit." Pet. App. 24a. Noting that mandamus may issue only if "the district court committed a clear error of law at least approaching the magnitude of an unauthorized exercise of judicial power," the court of appeals had no difficulty concluding that the automakers "ha[d] not met this rigorous standard for the issuance of the extraordinary writ of mandamus." Pet. App. 30a (original quotation marks omitted).

Viewing Judge Wolin's order as one remanding the claims to state courts, the Third Circuit held that appellate review of any kind was barred by 28 U.S.C. § 1447(d). In support of this holding, the court relied chiefly on this Court's opinion in *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995), which "clarified the scope of the prohibition of review of remand orders imposed by § 1447(d)." Pet. App. 34a. This Court there held that, "[a]s long as a district court's remand is based on a timely raised defect in removal procedure or on lack of subject-matter jurisdiction – the grounds for remand recognized by § 1447(c) – a court of appeals lacks jurisdiction to entertain an appeal of the remand order under § 1447(d)." 516 U.S. at 127-128 (quoted in Pet. App. 34a). The Third Circuit accordingly concluded that *Things Remembered* dictated the outcome here: "As the basis

for the District Court's remand in this case was lack of subject matter jurisdiction (the absence of 'related to' jurisdiction), appeal is similarly barred." Pet. App. 34a. Finally, emphasizing that the statutory language bars review of remand orders "on appeal or otherwise," the Third Circuit held itself without jurisdiction to grant mandamus, holding that § 1447(d) applies regardless "whether review is sought by appeal or by extraordinary writ." Pet. App. 37a (citations omitted).

5. On August 1, 2002, the Third Circuit unanimously denied petitioners' motion for recall of the mandate and for a stay pending the filing of a petition for writ of certiorari. Pet. App. 46a. On August 2, 2002, petitioners applied to Justice Souter for a stay, who denied the application on August 5. That same day, petitioners renewed their application for a stay, asking that it be presented to Justice Kennedy. On August 7, the Court unanimously denied petitioners' stay application, which Justice Kennedy had referred to the Court.

ARGUMENT

The decision below is correct. Contrary to petitioners' assertion, there is no conflict among the circuits on the question presented, and there is no conflict with any decision of this Court. Indeed, the Third Circuit's decision is fully in accord with this Court's opinion in *Things Remembered*, which squarely forecloses appellate review of the district court's remand orders.

1.a. Petitioners removed the claims at issue from the state courts pursuant to 28 U.S.C. § 1452(a), the bankruptcy removal statute. That section permits removal if the federal district court "has jurisdiction of such claim or cause of action under section 1334." Section 1447 governs "procedure after removal generally." Section 1447(c) provides: "If at any time

before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." Subsection (d) in turn provides: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise," with an exception for certain civil rights cases removed under § 1443.

The bar against appellate review set forth in § 1447(d) "expresses a long respected policy of Congress, which had its origins in the Judiciary Act of 1887." *Application of Rosenthal-Block China Corp.*, 278 F.2d 713, 714 (2d Cir. 1960). This policy is designed to prevent "interrup[tion] of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the district court to which the cause is removed." *United States v. Rice*, 327 U.S. 742, 751 (1946). Recognizing that removal and appeal of remand orders "may be designed to achieve little more than a self-help continuance," Congress has determined that remands are to be effective immediately so that state trial courts can return to work. *Hernandez v. Brakegate, Ltd.*, 942 F.2d 1223, 1226 (7th Cir. 1991).

This Court held in *Things Remembered* that the bar against appellate review set forth in § 1447(d) means exactly what it says. There, the respondent had sued the petitioner on commercial claims in Ohio state court. Petitioner later filed for bankruptcy in the Southern District of New York. Respondent then filed a notice of removal seeking to remove the state-court action to Ohio federal district court, coupled with a motion to transfer venue to the New York bankruptcy court. 516 U.S. at 125-26. The district court held the removal untimely and effectively remanded the case to the Ohio state court. *See id.* at 127 n.2 & 128. Petitioner appealed to the Sixth Circuit, which held that § 1447(d)

barred appellate review and dismissed the appeal for lack of jurisdiction.

This Court affirmed. It noted that "§ 1447(d) must be read *in pari materia* with § 1447(c), so that only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d)." 516 U.S. at 127. Section 1447(c) specifies two such grounds: a defect in removal procedure or a lack of subject-matter jurisdiction. The Court accordingly ruled (516 U.S. at 127-28):

> As long as the district court's remand is based on a timely raised defect in removal procedure or on a lack of subject-matter jurisdiction — the grounds for remand recognized by § 1447(c) — a court of appeals lacks jurisdiction to entertain an appeal of the remand order under § 1447(d).

The Court in its opinion also clarified the relationship between § 1447(d) and § 1452(b), the remand provision of the bankruptcy removal statute, which limits the scope of remand, and appellate review of remand orders, in somewhat different terms. Prior to 1995, some courts had held that, where a claim was removed pursuant to the bankruptcy removal statute, judicial review of any remand order was governed exclusively by § 1452(b), so that the absolute bar against appellate review contained in § 1447(d) did not apply. This Court explicitly rejected the rationale of these cases, holding:

> If an order remands a bankruptcy case to state court because of a timely raised defect in removal procedure or lack of subject-matter jurisdiction, then a court of appeals lacks jurisdiction to review that order under § 1447(d), regardless of whether the case was removed under § 1441(a) or § 1452(a).

516 U.S. at 129.

Here, Judge Wolin held that the federal district courts "lack subject matter jurisdiction over the Friction Products Claims," and he accordingly "remanded [those claims] to the state courts from which they were removed pursuant to 28 U.S.C. § 1447." Pet. App. 57a. Lack of subject-matter jurisdiction is one of the two grounds for remand specifically enumerated in § 1447(c). Thus, under the plain language of § 1447(d), the district court's order "is not reviewable on appeal or otherwise." That appellants removed the claims under § 1452(a), as opposed to § 1441(a), does not affect this conclusion, as this Court in *Things Remembered* expressly held.[2]

b. Petitioners acknowledge "the general rule that remand orders are unappealable." Pet. 17. However, they challenge the decision below by citing an exception to this rule recognized in *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), under which the bar against appellate review does not apply to remand orders in excess of the district court's statutory authority. Petitioners contend that the district court here exceeded its authority by remanding the claims directly to state courts, not only in Delaware, but also in other States. The court of appeals rejected petitioners' assertion that § 1447(c) does not authorize such "cross-jurisdictional remands," citing Third Circuit precedent and a

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[2] Consistently with this Court's opinion in *Things Remembered*, the courts of appeals have uniformly held that an order remanding a case to the state court from which it was removed is immune from judicial review under § 1447(d), regardless whether the case was originally removed under § 1441(a) or § 1452(a). *See, e.g., Spring City Corp. v. American Bldgs. Co.*, 193 F.3d 165, 169-70 (3d Cir. 1999); *State of Rio de Janeiro v. Philip Morris Inc.*, 239 F.3d 714, 715 (5th Cir. 2001); *In re Ford Motor Co./Citibank (South Dakota), NA*, 264 F.3d 952, 964 (9th Cir. 2001); *Phoenix Container, L.P. v. Sokoloff*, 235 F.3d 352, 354 (7th Cir. 2000); *Pierpoint v. Barnes*, 94 F.3d 813, 819 n.3, 820 (2d Cir. 1996).

recent decision of the D.C. Circuit. *See* Pet. App. 34a-36a (citing *Republic of Venezuela v. Philip Morris, Inc.*, 287 F.3d 192 (D.C. Cir. 2002)). Petitioners contend that this holding was erroneous. *See* Pet. 21-24. They also allege a circuit conflict on this question, citing an unpublished opinion of the Ninth Circuit. *See* Pet. 21-22.

Both contentions are wrong. There is nothing in the language of § 1447 to support petitioners' assertion that a valid remand can be ordered only by the district court to which the claim was initially removed (or, phrased differently, that a transferee court cannot remand a claim directly to a state court in another State). Section 1447(c) provides simply that, "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." The statute does not specify or limit which court may issue a remand order; rather, it contemplates that the remand will be ordered by whatever district court makes the determination that federal subject-matter jurisdiction is lacking. Here, as a result of the provisional transfers that petitioners themselves sought, that jurisdictional determination was made by the Delaware District Court. Section 1447(c) thus authorized – indeed, by use of the verb "shall," it required – the Delaware District Court to remand the claims.[3]

Tellingly, petitioners' discussion of this issue (Pet. 21-24) completely sidesteps § 1447 and focuses instead on § 1452,

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[3] Section 1447(d) does impose one restriction on the district court's authority: for the bar on appellate review to apply, the order must be one "remanding a case to the State court *from which it was removed.*" That requirement was plainly satisfied here: Judge Wolin's order explicitly remanded the claims "to the state courts from which they were removed pursuant to 28 U.S.C. § 1447." Pet. App. 57a; *see id.* 94a-96a (remand order dated August 6, 2002).

the bankruptcy removal statute. The remand provisions of § 1452 differ from those of § 1447 in four respects:

- § 1452(b) authorizes remand on "any equitable ground," whereas § 1447(c) authorizes remand on two specified legal grounds (lack of subject-matter jurisdiction or defect in removal procedure);
- § 1452(b) authorizes remand by "[t]he court to which such claim or cause of action is removed," whereas § 1447(c) refers simply to "the district court";
- § 1452(b) makes remand permissive ("may remand"), whereas § 1447(c) makes it mandatory ("the case shall be remanded"); and
- § 1452(b) makes remand orders non-reviewable "by the court of appeals under section 158(d), 1291, or 1292 of this title," whereas § 1447(d) states categorically that a § 1447(c) remand order "is not reviewable on appeal or otherwise," with no limitation apart from specified civil rights cases.

In contending that the district court's "cross-jurisdictional remand" exceeded its statutory authority, petitioners argue that the District of Delaware, as the transferee court, was not "[t]he court to which such claim or cause of action [was] removed" for purposes of § 1452(b). *See* Pet. 21-23. But § 1452(b) has no bearing here: having determined that subject-matter jurisdiction was lacking, Judge Wolin based his remand on § 1447(c), which explicitly states that if "the district lacks subject matter jurisdiction, the case shall be remanded." *See* Pet. App. 57a (citing 28 U.S.C. § 1447). Indeed, because lack of subject-matter jurisdiction is a legal, not an equitable, ground, Judge Wolin necessarily based his

remand on § 1447(c). He cited § 1452(b) as an "alternative" basis for remand, which would follow as a consequence of his alternative holding concerning equitable abstention. *See* Pet. App. 57a, 77a. The court of appeals had no occasion to reach that alternative holding. *See* Pet. App. 19a. Thus, no question as to the proper construction of § 1452(b) is raised here, and petitioners' reliance on that provision is wholly misplaced.

For similar reasons, there is no basis for petitioners' assertion of a conflict between the opinion below and the Ninth Circuit's unpublished opinion in *In re U.S. Refining & Mktg. Co. (Hudson-Ram L.P. v. Archer)*, 210 F.2d 387 (table), 2000 WL 14398 (9th Cir. Jan. 7, 2000) (unpublished). The remand order in that case was entered under § 1452(b), and the Ninth Circuit reversed on the ground that the district court which ordered the remand was not "[t]he court to which [the] claim or cause of action [had been] removed" within the meaning of § 1452(b). Because the Ninth Circuit had no occasion to address, and did not address, § 1447(d), its decision does not conflict with the decision below. Conversely, as petitioners admit (Pet. 22-23), both the Third Circuit and the D.C. Circuit have held that § 1447(d) bars appellate review of a remand order regardless whether it is "cross-jurisdictional" in nature, and no court has held to the contrary.

Equally important, the Ninth Circuit opinion on which petitioners rely was unpublished. Under that court's rules, unpublished decisions may not be cited as precedent (except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel). *See* CTA9 Rule 36-3. Thus, the Ninth Circuit's unpublished decision could not create a "conflict" requiring resolution by this Court, even if its

decision were inconsistent with the Third Circuit's decision, which it is not.

Finally, there is no conflict between the Third Circuit's decision and any decision of this Court. Quite the contrary: it is petitioners who, by urging reversal, seek to contravene this Court's decisions. Because the text of § 1447(d) is hopelessly against them, petitioners in effect urge that § 1452(b) should be the exclusive provision controlling remand orders in bankruptcy cases. *See* Pet. 22-23. As noted above, this Court in *Things Remembered* explicitly rejected that proposition. *See* 516 U.S. at 129 (finding "no express indication in § 1452 that Congress intended that statute to be the exclusive provision governing removals and remands in bankruptcy" nor "any reason to infer from § 1447(d) that Congress intended to exclude bankruptcy cases from its coverage").[4]

2. Petitioners also ask this Court to review the Third Circuit's ruling that it would lack jurisdiction to review the district court's order if that order were considered, in the alternative, as a denial of motions to transfer. *See* Pet. 14-17.

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[4] Petitioners also ask this Court to review the Third Circuit's supposed conclusion that a remand order premised on lack of subject-matter jurisdiction would be non-reviewable *even if* the order exceeded the district court's statutory authority. *See* Pet. 17-21. Since the court of appeals expressly held that Judge Wolin's remand order was *within* his statutory authority (Pet. App. 34a-36a), the question petitioners posit is entirely hypothetical here, and their allegation of a circuit conflict on this point (Pet. 20-21) is thus completely meritless. In any event, contrary to petitioners' assertion (Pet. 19), the Third Circuit did not embrace an "untenably overbroad" interpretation of *Things Remembered*. In the passage to which petitioners refer (Pet. App. 34a), the court of appeals recites this Court's holding in that case, quotes a key sentence from the Court's opinion, and applies it in a straightforward manner to this case. Nothing in the court of appeals' discussion suggests the "negative pregnant" that petitioners would inject into it.

Petitioners do not contest the unavailability of mandamus, since the district court's decision that it lacked subject-matter jurisdiction was firmly grounded on Third Circuit precedent. However, petitioners contend that the court of appeals erred in holding them to a mandamus standard, asserting that the denial of a motion for change of venue is immediately appealable – at least in bankruptcy cases – either as a "final decision" under 28 U.S.C. § 1291 or under the "collateral order doctrine" of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Petitioners contend that the Third Circuit's decision conflicts, in this respect, with the Sixth Circuit's decision in *In re Dow Corning Corp.*, 86 F.3d 482 (6th Cir. 1996).

a. The question whether the denial of a motion for change of venue is subject to direct appeal is not properly presented here. Petitioners below were plainly not aggrieved by Judge Wolin's handling of the "transfer" issue. He granted a provisional transfer, as they requested, and he decided the issue of subject-matter jurisdiction on a uniform, global basis, as they asked. In a procedural sense, therefore, petitioners got exactly what they wanted in the district court. At the appellate level, the issue of "transfer" was completely irrelevant: no one before the court of appeals disputed the propriety of the provisional transfer, and that issue was effectively moot. It no longer presented a justiciable case or controversy.

Under these circumstances, petitioners' assertion that they are merely seeking review of the ultimate denial of their transfer motions is a subterfuge designed to evade Congress's clearly-stated bar against appellate review of remand orders. Judge Wolin squarely held that the federal district courts lacked subject-matter jurisdiction of the claims against petitioners and, as § 1447(c) requires, he accordingly

"ordered that [those] claims are remanded to the state courts from which they were removed." Pet. App. 57a. In consequence of that holding, there remained no legal issue for the federal courts to decide, and disposition of the pending motions to transfer, which the district court had provisionally granted, became a mere matter of housekeeping. It was immaterial whether Judge Wolin denied the transfer motions; vacated his order allowing the provisional transfer; or simply left the transfer motions in abeyance as moot. Any of these actions would have been entirely *pro forma*.

The district court's ultimate denial of transfer, in short, was simply the logical consequence of its determination that it lacked subject-matter jurisdiction; it was not a substantive holding with independent significance apart from the remand order. Petitioners' appellate briefs advanced no argument concerning the propriety of "transfer" per se. And petitioners plainly did not desire the relief that would flow from mere reversal of the denial of their motions to transfer. That would simply restore the *status quo ante*: the claims would be in Judge Wolin's court, as they were following the provisional transfer. But Judge Wolin had already made clear what he would do with the claims – he would remand them to the state courts for lack of subject-matter jurisdiction. The relief petitioners sought from the court of appeals, obviously, was reversal of Judge Wolin's jurisdictional determination and remand order. But those are precisely the issues that

Congress, in enacting § 1447(d), has made non-reviewable "on appeal or otherwise."[5]

For these reasons, the district court's *pro forma* denial of petitioners' motions to transfer does not furnish an independent ground for appellate jurisdiction that would enable petitioners to evade the § 1447(d) bar on appellate review of remand orders. Indeed, in *Things Remembered*, this Court held that § 1447(d) barred appellate review even though the district court had concurrently denied a motion to transfer. The respondent there had filed a notice of removal in Ohio bankruptcy court and a motion to transfer to New York bankruptcy court. The Ohio bankruptcy court concluded that removal was proper and granted the motion to transfer; the district court reversed. *See* 516 U.S. at 126-27. The

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[5] When a district court has remanded claims to state court for lack of subject-matter jurisdiction, and has also decided a separate and independent issue — *e.g.*, dismissal of a cross-claim or the propriety of substituting parties — an appellate court may have jurisdiction to review the *latter issue*. *See City of Waco, Tex. v. United States Fid. & Guar. Co.*, 293 U.S. 140, 143 (1934); *Aliota v. Graham*, 984 F.2d 1350, 1353 (3d Cir. 1993). Appellate review is permitted, however, only where the other issue is "'in logic and in fact' severable from the court's determinations regarding remand." *Nutter v. Monongahela Power Co.*, 4 F.3d 319, 321, 323 (4th Cir. 1993); *see Aliota*, 984 F.2d at 1353 (§ 1447(d) bars review of any issue "inextricably linked to the question of remand"); *Ariail Drug Co. v. Recomm Int'l Display, Inc.*, 122 F.3d 930, 934 (11th Cir. 1997) (review unavailable unless issue is "separate and independent" from determination of subject-matter jurisdiction); *Clorox Co. v. United States District Court*, 779 F.2d 517, 520 (9th Cir. 1985) (review unavailable unless district court has decided "some matter of substantive law 'apart from any jurisdictional decision'"). Here, the district court's denial of petitioners' transfer motions did not involve any discrete issue of substantive law, much less an issue that was "independent of" or "severable from" his jurisdictional holding and remand order. Quite the contrary: Judge Wolin's denial of the transfer motions was the direct consequence of his holding that he lacked subject-matter jurisdiction and was thus "inextricably linked" to his remand order. *Aliota*, 984 F.2d at 1353.

Sixth Circuit and this Court both held that appellate jurisdiction was barred by § 1447(d), notwithstanding that a motion to transfer had been filed, granted, and reversed. This Court's holding in *Things Remembered* thus makes clear that the additional question petitioners seek to present – whether the denial of a motion for change in venue is subject to direct appeal – is not properly presented here, because on the facts of this case it is inseparable from, and a mere proxy for, the question whether the district court's remand order is subject to appellate review.

b. Even if the question whether the denial of a motion for change of venue is reviewable on direct appeal were properly presented here, there is no conflict among the circuits requiring this Court's review. Petitioners assert a conflict with *Dow Corning*, where the Sixth Circuit entertained an appeal from the denial of a transfer motion. While recognizing that motions for change of venue generally do not constitute "final decisions of the district courts" within the meaning of 28 U.S.C. § 1291, the Sixth Circuit cited what it called "a more relaxed rule of appealability in bankruptcy cases" to justify "appellate review of orders that in other contexts might be considered interlocutory." 86 F.3d at 488.

Putting aside questions as to the correctness of the Sixth Circuit's ruling, *Dow Corning* differs from the instant case in a critical respect: in *Dow Corning*, the district court had not entered an order under § 1447(c) remanding the claims at issue to the state courts. The district court in *Dow Corning* did not mention § 1447(c) in its opinion, and it specifically declined to issue a remand order. Rather, it stated that any "orders to dismiss or sever the Debtor and/or remanding the claims to the state court should be addressed by the district court where those causes of action are currently pending." 187 B.R. 934, 938 (E.D. Mich. 1995). The Sixth Circuit in its opinion specifically noted the limited nature of the district

court's action. *See* 86 F.3d at 487 ("In denying the transfer motions, the district court also directed that individual federal courts nationwide dismiss or sever Dow Corning and/or remand the [claims at issue] to state court.").

By its terms, § 1447(d) bars appellate review only where a district court has issued "[a]n order remanding a case to the State court from which it was removed." No such order existed in *Dow Corning*, and the Sixth Circuit's opinion does not suggest that appellees advanced a § 1447(d) argument in their briefs. However, shortly after the principal appellate briefs were filed, this Court issued its opinion in *Things Remembered*. The Sixth Circuit then issued, *sua sponte*, an order directing counsel to address at oral argument "what application, if any, the Supreme Court's decision in *Things Remembered* * * * has to these appeals." Order dated Feb. 23, 1996 (unpublished). After hearing argument, the Sixth Circuit was satisfied that the district court had not issued a remand order that would call into play the § 1447(d) bar on appellate review. Accordingly, the Sixth Circuit's opinion deals only with the "final decision" requirement of § 1291; it does not mention § 1447(d) anywhere in its opinion.

The Sixth Circuit's decision in *Dow Corning* would conflict with the decision below only if it could be said with certainty that the Sixth Circuit would allow an immediate appeal of the denial of a transfer motion, notwithstanding that the district court had issued an order under § 1447(c) remanding the claims to the state courts. Since no remand order existed in *Dow Corning*, and since the Sixth Circuit consequently did not address § 1447(d) in its opinion, there is no plausible basis for such a prediction. Quite the contrary: by directing counsel to discuss the possible application of *Things Remembered* to the *Dow Corning* appeals, the Sixth Circuit made it plain that the existence of a § 1447(c) remand order, such as Judge Wolin issued here, would have altered

its jurisdictional analysis considerably. For these reasons, there is no conflict between *Dow Corning* and the Third Circuit's decision in this case.[6]

3. Finally, this case is not invested with such importance as to warrant the grant of certiorari in the absence of a circuit conflict. Contrary to petitioners' assertion, the question raised here is not "whether the American judicial system can address the exploding national asbestos litigation crisis with even a modicum of fairness and rationality." Pet. 1. This case presents a straightforward question of appellate jurisdiction, which could arise in any bankruptcy case. And the question is not novel. This Court recently addressed the very same question of appellate jurisdiction in *Things Remembered*, and its resolution of that question controls the outcome here.

According to petitioners, this case is important because it presents an opportunity for determining "whether the expert opinions underlying the friction-product claims pass scientific muster under *Daubert v. Merrell Dow Pharmaceuticals*." Pet. 1. One may accept *arguendo* petitioners' assertion that the possibility of resolving common issues of causation and science through a *Daubert* summary-judgment proceeding is "an immensely important legal issue" in the context of asbestos bankruptcies. Pet. 3. The short answer, however, is that such proceedings can be conducted, if the courts deem them useful, without petitioners' being present. At least a dozen major asbestos bankruptcies are currently pending in

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[6] For the same reasons, petitioners err (Pet. 16) in alleging a conflict between the decision below and the Fourth Circuit's decision in *A.H.Robins Co., Inc.. v. Piccinnin*, 788 F.2d 994 (1986). That court entertained an immediate appeal from an order *granting* a motion to transfer. By definition, therefore, a § 1447(c) remand order did not exist, and could not possibly have existed in that case, and the § 1447(d) bar against appellate review was similarly inapplicable.

various district courts, and some form of "global *Daubert* proceeding" is being urged by several of those debtors as a mechanism for resolving asbestos claims. Indeed, there is nothing to prevent Judge Wolin from conducting a "global *Daubert* proceeding" in this very case – the Debtors currently have more than 300,000 friction-product asbestos claims pending against them – if such a proceeding were sought by the Debtors and if Judge Wolin were persuaded to put aside the reservations he has thus far expressed.[7]

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[7] Although petitioners believe that a global *Daubert* hearing holds the promise of resolving "thousands of asbestos friction-product claims in one fell swoop" (Pet. 24), Judge Wolin noted that this proposition "is hotly and legitimately debated." Pet. App. 80a. This Court's opinion in *Daubert*, and its subsequent opinion in *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999), make it clear that the admissibility of scientific evidence is determined on a case-by-case, rather than a global, basis. *See* 509 U.S. at 592-93; 526 U.S. at 153-57. As Judge Wolin observed, "[d]epending on what the scientific evidence shows, it may well appear that causation issues are not sufficiently common between litigants to permit Rule 42 trials." Pet. App. 80a. Judge Wolin's observation comports with this Court's discussion of Rule 23 commonality in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), and *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). Moreover, every state has either adopted *Daubert* or has otherwise established a standard for excluding unreliable scientific evidence, yet petitioners offer no explanation why asbestos defendants, over the past decade, have been unable to convince federal and state courts to exclude plaintiffs' scientific evidence across the board and dismiss their claims as a matter of law. In fact, petitioners' trust in a "one fell swoop" resolution under *Daubert* flies in the face of *State ex rel. Mobil Corp. v. Gaughan*, 563 S.E.2d 419 (W. Va. 2002), *cert. denied*, 123 S.Ct. 346 (No. 02-132, Oct. 7, 2002). There, consolidation of a large number of asbestos personal injury claims in a jurisdiction that applies *Daubert* standards (*see Wilt v. Buracker*, 443 S.E.2d 196 (W.Va. 1993)) made possible the sort of proceedings that petitioners favor. But that case did not give rise to any form of *Daubert* summary-judgment proceeding – whether "global" or keyed to specific products or defenses – but rather to a petition for certiorari by defendants arguing that consolidation of so many claims prejudiced their defense. In this respect, the instant case is indistinguishable from the West Virginia case, and it is difficult to

If a *Daubert* summary-judgment procedure actually represents the panacea for bankruptcy practice and asbestos litigation that petitioners imagine, the viability of that procedure can be tested by numerous district courts in numerous bankruptcies, on the basis of asbestos claims over which they indisputably have jurisdiction. There is simply no justification for warping well-established principles of subject-matter jurisdiction, not to mention appellate jurisdiction, so as to enable the automakers to hijack somebody else's bankruptcy.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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understand what legitimate bases petitioners might have to believe that they would be more successful in getting tens of thousands of asbestos claims dismissed "in one fell swoop" in the Delaware District Court.

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Date: December 2, 2002

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DEC 0 2 2002

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No. 02-661

IN THE
Supreme Court of the United States

IN RE FEDERAL-MOGUL GLOBAL, INC.

DAIMLERCHRYSLER CORPORATION,
FORD MOTOR COMPANY, and
GENERAL MOTORS CORPORATION,

Petitioners,

v.

OFFICIAL COMMITTEE OF ASBESTOS CLAIMANTS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION OF 3M COMPANY FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*

3M Company, by its counsel, moves pursuant to Rule 37.2 of the rules of the Supreme Court of the United States, for leave to file the annexed brief as *amicus curiae* in support of the petition for a *writ of certiorari* to the United States Court of Appeals for the Third Circuit. The petitioners, who filed the petition for a *writ of certiorari* on October 29, 2002, have consented to the filing of this brief. *Amicus* was not able to secure the consent of all respondents. A copy of the proposed *amicus* brief is attached hereto.

As set forth in the statement of interest contained in the brief, the *amicus* has been named as a defendant with one or more of the petitioners and Federal-Mogul Global, Inc. (the "Debtor") in asbestos personal injury cases pending throughout the United States. As alleged joint tortfeasors in the underlying asbestos actions, the litigation of asbestos claims against the *amicus* will give rise to indemnification and contribution claims against the Debtor and other manufacturers of asbestos products. Thus, the *amicus* is a direct beneficiary of any trust that may be established under section 524(g) of title 11 of the United States Code and any plan of reorganization approved in the Debtor's chapter 11 case. As such, the *amicus* has a direct and vital interest in the issues presented to the Court — the Third Circuit's jurisdiction to review an order denying the petitioners' motion to transfer, and the scope of federal courts' jurisdiction over proceedings related to a chapter 11 case within the meaning of 28 U.S.C. § 1334(b).

The *amicus* supports the petition for a *writ of certiorari* which seeks review of the Third Circuit's decision in *In re Federal-Mogul Global, Inc.*, 300 F.3d 368 (3d Cir. July 31, 2002). In that decision, the Third Circuit refused to exercise appellate jurisdiction over the petitioners' appeal of the District Court's denial of their motion to transfer, and in reviewing the District Court's order on a mandamus standard, the Third Circuit articulated an overly restrictive and unworkable definition of federal "related to" jurisdiction that all but eliminated federal "related to" jurisdiction over litigation among nondebtors.

The Third Circuit erred in both respects. In refusing to exercise appellate jurisdiction over the District Court's order, the Third Circuit failed to apply the collateral order doctrine first enunciated by the Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and adopted by every circuit court of appeals. Presented with facts very similar to those presented here, the Sixth Circuit in *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Connecticut (In Re Dow Corning Corp.)*, 86 F.3d 482 (6th Cir. 1996), exercised appellate jurisdiction based on the collateral order doctrine.

Likewise, the Third Circuit's construction of federal "related to" jurisdiction as requiring an "automatic effect" upon the estate "without the intervention of yet another lawsuit" is in direct conflict with the Court's decision in *Celotex Corp. v. Edwards*, 514 U.S. 300, 307-08 (1995), as well as the decisions of the Fifth, Sixth, Seventh and Eighth Circuits. By its decision, the Third Circuit closed the door on the only avenue available to federal courts to centralize matters related to a bankruptcy case in one forum. The petitioners' brief does not address in depth the impact of the Third Circuit's narrow construction of federal

"related to" jurisdiction upon the nationwide asbestos litigation crisis. The a*micus* respectfully submits that its brief will assist the Court in ruling on the petition for *writ of certiorari*.*

For these reasons, the *amicus* respectfully requests that the Court grant it leave to file the attached brief in support of the petition for a *writ of certiorari*.

Respectfully submitted,

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* The Court has the discretion to entertain relevant arguments presented by the *amicus*, even where those arguments were not raised by the parties. *Teague v. Lane*, 489 U.S. 288, 300 (1989). *See also Mapp v. Ohio*, 367 U.S. 643, 673 n.5 (1949) (Court's holding was not based on argument contained in the appellant's brief, but upon a request made in the *amici* brief submitted by the American and Ohio Civil Liberties Unions) (Harlan, J. dissenting).

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INTEREST OF *AMICUS CURIAE*

3M Company, by its counsel, file this brief as *amicus curiae*.[1] The *amicus* was not able to secure the consent from all parties to file this brief. Accordingly, the *amicus* is filing this brief pursuant to Rule 37.2(b) of this Court.

The *amicus* has been named as a defendant with one or more of the petitioners and Federal-Mogul Global, Inc. ("the Debtor") in asbestos personal injury cases pending throughout the United States. As an alleged joint tortfeasor in these actions, the litigation of asbestos claims against the *amicus* will give rise to indemnification and contribution claims against the Debtor and other manufacturers of asbestos products. Thus, the *amicus* is a direct beneficiary of any trust established under section 524(g) of title 11 of the United States Code (the "Bankruptcy Code") in the Debtor's chapter 11 case. Allowing the asbestos claims against the *amicus* and the resulting indemnification and contribution claims against the Debtor to proceed separately from the plaintiffs' asbestos claims against the Debtor will be extremely inefficient and expensive for all parties. Identical and related factual and legal issues will have to be resolved thousands of times in different courts at great expense, while risking inconsistent rulings by courts on identical issues. On the other hand, resolving all related asbestos claims together in the same forum will enable the Debtor to properly deal with the claims of the *amicus* along with all other claims against the estate

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1. This brief was not authored, in whole or in part, by counsel to a party and no contribution to its preparation or submission was made by any person or entity other than the *amicus curiae* and its counsel.

in any plan of reorganization and section 524(g) trust approved in its chapter 11 case.

For these reasons, the *amicus* has a direct and vital interest in the issues presented to the Court — the jurisdiction of the United States Court of Appeals for the Third Circuit to review an order denying the petitioners' motion to transfer, and the scope of federal courts' jurisdiction over proceedings "related to" a chapter 11 case within the meaning of 28 U.S.C. § 1334(b).

The *amicus* supports the petitioners' petition for a *writ of certiorari*, and submits that the Third Circuit erred in ruling that it lacked appellate jurisdiction to review the District Court's denial of the petitioners' motion to transfer, and in applying a restrictive definition of "related to" jurisdiction that conflicts with the prior decision of the Court as well as the decisions of other circuit courts of appeals. The *amicus* also submits this brief to impress upon the Court the critical need for a centralized resolution of what this Court has described as the "elephantine mass" of asbestos cases pending in the courts.

SUMMARY OF ARGUMENT

The asbestos litigation was once comprised of claims by workers who had been seriously injured or had died as a result of direct, substantial exposure to asbestos. These claims involving disabling or fatal asbestos-related diseases are now dwarfed by the tens of thousands of lawsuits filed each year by individuals with indirect, limited exposure to asbestos who are not, by any common sense definition of the word, "sick." As numerous companies that were directly involved

with the manufacture or sale of products containing asbestos have filed for bankruptcy protection, the plaintiffs have expanded the universe of defendants to include any and every company that had any connection, however remote, with the manufacture, sale or use of any kind of product that contained or was used in conjunction with asbestos.

The cumulative number of these highly questionable claims has driven over 60 companies to seek protection under the Bankruptcy Code, more than 20 in the last two years alone. None of those companies has professed an inability to pay fair compensation to the truly sick. All have attributed their bankruptcies to the ever-growing number of unimpaired claimants who continue to file claims each year in carefully selected state court jurisdictions.

The petitioners and the *amicus* are among the newer defendants that have been brought into this ever-expanding asbestos litigation. By their transfer motion under 28 U.S.C. § 157(b)(5), the petitioners asked the District Court below to utilize the only vehicle available to federal courts to transfer cases pending in both federal and state courts throughout the United States to a single forum for a centralized and efficient resolution. The District Court denied that motion, based on its ruling that it lacked "related to" jurisdiction over the claims against the petitioners. On appeal, the Third Circuit ruled that it lacked appellate jurisdiction to review the District Court's denial of the transfer motion. The Third Circuit also held that, on a mandamus review standard, the District Court did not err in ruling that the asbestos claims asserted against the petitioners are not "related to" the Debtor's chapter 11 case.

The Third Circuit erred in both respects. The Third Circuit's failure to exercise appellate jurisdiction cannot be reconciled with the Court's collateral order doctrine articulated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), that has been adopted by every other circuit court of appeals. Likewise, the Third Circuit's narrow construction of federal "related to" jurisdiction is in direct conflict with the Court's decision in *Celotex Corp. v. Edwards*, 514 U.S. 300, 307-08 (1995), as well as the decisions of the Sixth Circuit in *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Connecticut (In re Dow Corning Corp.)*, 86 F.3d 482 (6th Cir. 1996), the Fifth Circuit in *Wood v. Wood (In re Wood)*, 825 F.2d 90, 94 (5th Cir. 1987), the Eight Circuit in *Kocher v. Dow Chemical Co.*, 132 F.3d 1225, 1231 (8th Cir. 1997), and the Seventh Circuit in *In re FedPak Sys., Inc.*, 80 F.3d 207 (7th Cir. 1996). For these reasons, the *amicus* respectfully submits that the Court should grant the petition for a *writ of certiorari*.

ARGUMENT

I.

THE THIRD CIRCUIT ERRED IN REFUSING TO EXERCISE APPELLATE JURISDICTION OVER THE ORDER DENYING THE TRANSFER MOTION

The Third Circuit below erred in ruling that it lacked appellate jurisdiction to review the District Court's order denying the petitioners' transfer motion. *In re Federal-Mogul Global, Inc.*, 300 F.3d 368, 378-79 (3d Cir. July 31, 2002). This ruling failed to apply the collateral order doctrine enunciated by the Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and is in direct conflict with the decisions of other courts of appeals.

In *Cohen*, the Court established the collateral order doctrine, and held that an appellate court may exercise appellate jurisdiction over an interlocutory order where a decision "finally determine[s] claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546. The Court also noted that the policy of avoiding piecemeal appeals was outweighed by the need to permit appellate review of important issues:

> But this order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably.

Id. at 546.

Consistent with *Cohen*, every circuit court of appeals has exercised appellate jurisdiction over interlocutory orders based on the collateral order doctrine. *See, e.g.*, *Autoridad De Energia Electrica De Puerto Rico v. Ericsson Inc.*, 201 F.3d 15, 17 (1st Cir. 2000) (employing collateral order doctrine); *United States v. Ramirez*, 297 F.3d 185, 190 (2d Cir. 2002) (same); *United States v. Scarfo*, 263 F.3d 80, 87 (3d Cir. 2001) (same); *Gould v. Davis*, 165 F.3d 265, 268 (4th Cir. 1998) (same); *Clark v. Johnson*, 278 F.3d 459, 460-61 (5th Cir. 2002) (same); *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers of Connecticut (In re Dow Corning Corp.)*, 86 F.3d 482, 488 (6th Cir. 1996) (same), *cert. denied*, 519 U.S. 1071 (1997); *Williams v. Katz*, 23 F.3d

190, 192 (7th Cir. 1994) (same); *Maitland v. Univ. of Minnesota*, 260 F.3d 959, 962 (8th Cir. 2001) (same), *cert. denied*, 122 S. Ct. 1300 (2002); *Curry v. Castillo (In re Castillo)*, 297 F.3d 940, 946 (9th Cir. 2002) (same); *Timpanogos Tribe v. Conway*, 286 F.3d 1195, 1199-1200 (10th Cir. 2002) (same); *Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1287 (11th Cir. 1999) (same); *United States v. Durenberger*, 48 F.3d 1239, 1241-42 (D.C. Cir. 1995) (same).

The collateral order doctrine is clearly applicable to the facts presented in this case. The District Court's order denying the petitioners' transfer motion conclusively determined that the petitioners' asbestos cases are not "related to" the Debtor's chapter 11 case. The order does not deal with the merits of the underlying action, and unquestionably is separable from and collateral to the issues raised in the action. Thus, the order will not be merged into a final judgment rendered in the case, and absent an interlocutory appeal, the order will never be subject to appellate review at the conclusion of the case on the merits. Moreover, for the reasons discussed in Point II, *infra*, the issue of whether the asbestos cases should be transferred to the District Court also raises issues that are too important to be denied appellate review.

Under similar circumstances, the Sixth Circuit in *Dow Corning Corp.* found that the interlocutory order denying similar motions to transfer as the motions filed in the District Court below was appealable under the collateral order doctrine. The Sixth Circuit stated:

> The district court's order conclusively determines that claims pending against the nondebtor

> defendants are not "related to" Dow Corning's bankruptcy proceeding for purposes of Section 1334(b). In addition, resolution of the "related to" jurisdictional question does not involve consideration of the merits of the pending tort claims. Finally, due to the unique circumstances of this case and the hardship that would inevitably result if we were to refrain from addressing the issues presented by this appeal at this time, the issues presented will be effectively unreviewable after a final judgment is rendered.

Dow Corning Corp., 86 F.3d at 488.

Thus, the Third Circuit erred in failing to exercise appellate jurisdiction over the District Court's order denying the motion to transfer. The Third Circuit's decision is directly contrary to the Court's decision in *Cohen* and conflicts with the decisions of every circuit court of appeals that has addressed the issue. As such, the Court should grant the petition for *writ of certiorari* and reverse the Third Circuit's decision not to exercise appellate jurisdiction over the District Court's order.

II.

THE THIRD CIRCUIT MISINTERPRETED THE SCOPE OF FEDERAL "RELATED TO" JURISDICTION

While the Third Circuit stated that it remained a "step away" from addressing whether the District Court below has "related to" jurisdiction over the asbestos claims asserted against the petitioners, it nevertheless reviewed the lower court's order on a mandamus review standard. In so doing, the Third Circuit interpreted the "conceivable effect" test articulated in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984), and adopted by the Court in *Celotex Corp. v. Edwards*, 514 U.S. 300, 307-08 (1995), as requiring that a proceeding between nondebtors must have

an "automatic" effect upon the estate, without the "intervention of yet another lawsuit." *Federal-Mogul*, 300 F.3d at 382. That ruling is in direct conflict with the Court's decision in *Celotex* as well as decisions of other courts of appeals. The *amicus* submits that the scope of federal related to jurisdiction is an issue of significance that should be subject to a uniform standard. For these reasons, as detailed below, the Court should grant the petition for *writ of certiorari*.

A. The Third Circuit's Definition of "Related to" Jurisdiction is in Direct Conflict with *Celotex* and Decisions of Other Circuit Courts

Federal jurisdiction over claims and causes of action related to a chapter 11 case is extremely broad. Section 1334(b) of title 28 of the United States Code provides district courts with jurisdiction over "all civil proceedings arising under title 11, or arising in or related to a case under title 11." The Court in *Celotex* explained the breadth of federal "related to" jurisdiction:

> Congress did not delineate the scope of "related to" jurisdiction, but its choice of words suggests a grant of some breadth. The jurisdictional grant in § 1334(b) was a distinct departure from the jurisdiction conferred under previous Acts, which had been limited to either possession of property by the debtor or consent as a basis for jurisdiction. . . . [C]ongress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate.

Celotex Corp. v. Edwards, 514 U.S. 300, 307-08 (1995) (internal footnotes and citations omitted). In adopting the "conceivable effect" test, the Court stated, "The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could

conceivably have any effect on the estate being administered in bankruptcy." *Id.* (citing *Pacor*, 743 F.2d at 994). The Court defined an action as having a "conceivable effect" on the estate if the outcome of the action "could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate." *Id.* The Court expressly stated that "proceeding[s] need not necessarily be against the debtor or against the debtor's property" to be "related to" a bankruptcy case. *Id.*

Notwithstanding the Court's articulation of the "conceivable effect" test to define the scope of federal "related to" jurisdiction, the Third Circuit below articulated an unworkable, restrictive test that essentially eliminates federal related to jurisdiction over proceedings involving nondebtors. The Third Circuit stated that a proceeding between nondebtors will have a "conceivable effect" upon the estate only if the outcome of that proceeding has an "automatic" effect upon the debtor's estate "without the intervention of yet another lawsuit." *Federal-Mogul*, 300 F.3d at 382.

Under this test, no proceeding among nondebtors could ever be related to a bankruptcy case, because no proceeding among nondebtors will ever have an automatic effect upon the estate without the intervention of another proceeding. Indeed, even in instances where the nondebtor has a contractual indemnity or guaranty right against the debtor — an example the District Court below cited as having an "automatic" effect upon the estate — the nondebtor will still have to take some additional step to enforce that contractual right against the debtor by filing a claim or commencing an adversary proceeding against the debtor. Upon the commencement of that proceeding, the debtor then has the opportunity to contest the nondebtor's indemnification or guaranty right. The Third Circuit's reliance upon the "automatic effect" test is a distinction without a difference.

Whether the underlying indemnification and contribution claims arise through contract or common law, the court will have to adjudicate these liabilities.

Other circuits that have adopted the "conceivable effect" test have refused to adopt such a restrictive definition of "related to" jurisdiction. Faced with facts very similar to those presented here, the United States Court of Appeals for the Sixth Circuit in *Dow Corning* construed section 1334(b) consistently with the Court's ruling in *Celotex*. In *Dow Corning*, like the petitioners here, nondebtor codefendants of debtor Dow Corning filed motions to transfer claims asserted against them arising from the plaintiffs' use of silicone gel breast implants to the district court where Dow Corning's chapter 11 case was pending. In reversing the district court, which ruled that it lacked related to jurisdiction over the claims against the nondebtors, the Sixth Circuit found that "'automatic' liability is not necessarily a prerequisite for a finding of 'related to' jurisdiction." *Dow Corning*, 86 F.3d at 491. The court explained that "[t]he potential for . . . [the debtor] being held liable to the nondebtors in claims for contribution and indemnification, or vice versa, suffices to establish a conceivable impact on the estate in bankruptcy." *Id.* at 494.

The Fifth Circuit in *Wood v. Wood (In re Wood)*, 825 F.2d 90, 94 (5th Cir. 1987), similarly refused to require an "automatic effect" upon the estate as it held that claims asserted against nondebtors based on joint conduct with the debtor were related to the debtor's bankruptcy case. The court stated, "We find support in the Court of Appeals for the Sixth Circuit and lower courts, which have held that when the plaintiff alleges liability resulting from the joint conduct of the debtor and non-debtor defendants, bankruptcy jurisdiction exists over all claims under section 1334." *Id.* (citing *In re Salem Mortgage Co.*, 783 F.2d 626, 634 (6th Cir. 1986); *In re Zamost*, 7 B.R. 859 (Bankr. S.D. Cal. 1980)).

Likewise, the Eight Circuit in *Kocher v. Dow Chemical Co.*, 132 F.3d 1225, 1231 (8th Cir. 1997), found that the district court had "related to" jurisdiction over plaintiffs' claims against nondebtors based on the nondebtors' "potential indemnification claims against" the debtor. The court stated, "Kocher's claims against [nondebtors] Dow Chemical and DuPont conceivably could affect Dow Corning's bankruptcy estate and thus are 'related to' the bankruptcy case." *Id.*

The Seventh Circuit has refused to follow the *Pacor* test altogether. For example, in *In re FedPak Sys., Inc.*, 80 F.3d 207 (7th Cir. 1996), the Seventh Circuit rejected the conceivable effect test:

> Some courts have adopted a sweeping test which holds that whenever a proceeding "could conceivably have any effect on the bankruptcy estate" it is related to a case under title 11 and the bankruptcy court has jurisdiction. *See, e.g., Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984). This circuit has adopted a more limited and, we believe, more helpful definition of the bankruptcy court's related to jurisdiction. Our precedents hold that "a case is related to a bankruptcy case where the dispute affects the amount of property available for distribution (i.e., the debtor's estate) or the allocation of property among creditors".

FedPak, 80 F.3d at 213-14 (citations omitted).

In applying this test, courts within the Seventh Circuit found related to jurisdiction over litigation among nondebtors based on the fact that the nondebtor asserted indemnification claims against the debtor, and the courts specifically rejected the need for an "automatic" effect. In *Apex Inv. Assocs., Inc. v. TJX Companies, Inc.*, the court stated:

> Apex also argues that even if TJX is entitled to indemnity, there can be no effect on the bankruptcy

> estate until Apex recovers a judgment against TJX, and TJX then files a claim against Ames. This argument is unavailing. Even if Apex is correct in arguing that this case cannot actually affect the estate until TJX pays Apex, it does not follow that the instant case is not "related to" the bankruptcy proceeding.

121 B.R. 522, 526 (N.D. Ill. 1990). Similarly, in *Salem Mills, Inc. v. Wisconsin Tool & Stamping Co.* (*In re Salem Mills, Inc.*), 148 B.R. 505 (Bankr. N.D. Ill. 1992), the court found related to jurisdiction over litigation among nondebtors based on the fact that the nondebtor filed a proof of claim against the debtor. The court stated, "Wisconsin Tool has filed a proof of claim based upon the indemnity agreement. Consequently, Wisconsin Tool's third-party action is related to the underlying bankruptcy case even though the Debtor is no longer a party litigant." *Id.* at 510.

In sum, the circuits have not adopted a uniform definition of federal "related to" jurisdiction. Most importantly, the rigid "automatic effect" test articulated by the Third Circuit below is not workable, and is in direct conflict with *Celotex* and the decisions of the Fifth, Sixth, Seventh and Eighth Circuits.

B. Federal "Related to" Jurisdiction and its Broad Scope Enable All Matters Related to a Bankruptcy Case to be Consolidated in a Single Forum for an Efficient and Effective Resolution

The breadth of federal "related to" jurisdiction and the authority under section 157(b)(5) of the district court sitting in bankruptcy to centralize all personal injury and wrongful death claims in one forum provide a unique opportunity to federal courts to both enhance the debtor's efforts to reorganize and to help solve the problems posed by the "elephantine mass of asbestos cases." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999). By adopting a restrictive definition of federal "related

to" jurisdiction that all but eliminates bankruptcy jurisdiction over proceedings among nondebtors, the Third Circuit foreclosed the availability of section 157(b)(5) to centralize all personal injury and wrongful death claims related to a bankruptcy case.[2]

Centralization of related claims serves dual purposes:

- To conserve judicial resources by permitting one court (not thousands) to preside over actions involving common facts and legal issues; and
- to conserve the resources of all parties involved in order either to ensure maximum return to creditors if liability is determined or to protect defendants from overwhelming defense costs if liability is not found.

The Fourth Circuit in *A.H. Robins Co., Inc. v. Piccinin* described the importance of centralizing mass tort claims to the ultimate goal of a bankruptcy case, which is confirming a plan of reorganization:

> [T]here are very real considerations that support a centralization of all the Dalkon Shield claims, at least at first, in the district court having jurisdiction of the bankruptcy. The "single focal point" of this proceeding is the development of a reasonable plan of reorganization for the debtor, one which will work

2. Section 157(b)(5) provides:

> The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

28 U.S.C. § 157(b)(5).

> a rehabilitation of the debtor and at the same time assure fair and non-preferential resolution of the Dalkon Shield claims.

788 F.2d 994, 1011 (4th Cir. 1986) (citations omitted).[3]

The plain language of section 157(b)(5) reflects Congress' recognition of the importance of centralization as it states that the district court *shall* determine the venue for all personal injury and wrongful death claims related to the chapter 11 case, including cases pending in state court. "Section 157(b)(5) bestows upon the district court authority to transfer actions pending in state court." *Calumet Nat'l. Bank v. Levine*, 179 B.R. 117, 122 n.7 (N.D. Ind. 1995). The "plain language" of the statute authorizes the district courts to so act. *Murray v. Pan American World Airways, Inc. (In re Pan Am Corp.)*, 16 F.3d 513, 516 (2d Cir. 1994) ("the plain language of section 157(b)(5) authorized the district court to transfer [the] cases from Florida state court" to the district court). Accordingly, a party seeking to invoke the district court's power to transfer a personal injury or wrongful death action pending in state court need not first seek removal of the state litigation to federal court. *See, e.g., Beckwith v. U.S. Lines, Inc. (In re United States Lines, Inc.)*, No. 90 M 47(MP), 1990 WL 451981, at *1 (S.D.N.Y. Nov. 6, 1990) (authorizing transfer of nine state court cases directly to the federal district court pursuant to section 157(b)(5)); *In re Federal Press Co.*, 117 B.R. 942, 951 (Bankr. N.D. Ind. 1989) (bankruptcy court recommended that the district court transfer state cause of action directly to district court pursuant to section 157(b)(5)).

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3. These advantages of consolidating personal injury actions related to a bankruptcy case have been confirmed repeatedly. *See Murray v. Pan American World Airways, Inc.* (*In re Pan Am Corp.*), 16 F.3d 513, 516 (2d Cir. 1994); *Calumet Nat'l Bank v. Levine*, 179 B.R. 117, 120-21, 123 (N.D. Ind. 1995); *Newton v. Johns-Manville Corp.* (*In re Johns-Manville Corp.*), 45 B.R. 827 (S.D.N.Y. 1984).

By centralizing all related asbestos claims in one court, the debtor can properly deal with all related claims in a single plan of reorganization. Failure to consider all aspects of a bankruptcy case, including the contribution and indemnification claims of codefendants, could severely compromise the debtor's ability to effectively deal with its creditors. Indeed, the Eastern and Southern Districts of New York, conducting joint hearings in an effort to rehabilitate the *Manville* asbestos liability trust years after Manville emerged from chapter 11, identified the failure of the *Manville* plan to deal effectively with claims of nondebtor codefendants as one cause of the trust's fiscal demise. *In re Joint E. & S. Dist. Asbestos Litig.*, 129 B.R. 710, 732-33 (E.D.N.Y. & S.D.N.Y. 1991). The court noted that litigation involving claims by the codefendants and other claimants to the trust "present the most difficult issues in resolving this class action." *Id.* at 733. Centralizing all claims related to the chapter 11 case will avoid such problems and will enable the parties to address all matters related to the debtor's chapter 11 case in a coordinated and efficient manner.

The experiences in *A.H. Robins*, the Dalkon Shield mass tort case, and in *Drexel Burnham Lambert*, a mass financial tort bankruptcy case, evidence the benefits of successfully dealing with all claims, including the channeling of claims for contribution, reimbursement or indemnification by nondebtor codefendants into claims against a trust created for the benefit of creditors. *See In re Drexel Burnham Lambert Group Inc.*, 138 B.R. 723, 753 (Bankr. S.D.N.Y. 1992); *Securities and Exchange Commission v. The Drexel Burnham Lambert Group (In re Drexel Burnham Lambert Group, Inc.)*, 960 F.2d 285, 292 (2d Cir. 1992) (in each case, describing the channeling injunctions that were central to the debtor's chapter 11 plan), *cert. dismissed*, 506 U.S. 1088 (1993).

The congressional purpose underlying the breadth of "related to" jurisdiction and section 157(b)(5) — to eliminate the multiplicity of forums for the adjudication of parts of a bankruptcy case — is especially pertinent in the context of asbestos litigation, where a defendant having absolutely no liability on the merits may become financially impaired as a result of the raw expense of defending against individual actions thousands of times. Here, that raw expense drove the Debtor into chapter 11. The need for centralization in asbestos litigation is further compounded by the fact that most of asbestos cases being filed today are filed by plaintiffs with no impairing asbestos-related illness. While the use of asbestos and asbestos-containing products was dramatically reduced more than 20 years ago, the number of lawsuits filed by plaintiffs claiming that they were injured by asbestos has increased rather than decreased. Currently, there are hundreds of thousands of asbestos cases pending in the courts.[4]

The increasing number of asbestos claims filed by unimpaired claimants has also resulted in the filing of numerous

4. In a recent study, the RAND Institute for Civil Justice, which has been following asbestos litigation since 1984, estimates that 500,000 asbestos claims have been filed and that the number of new claims has risen sharply in recent years. Hensler, *Asbestos Litigation in the U.S.: A New Look at an Old Issue*, p. 2 (Institute for Civil Justice, RAND Corp., Aug. 2001). This study concludes that the number of claims yet to be filed could range from 500,000 to 2.5 million. *Id.* at 14. A decade ago, new asbestos claims were being filed at the rate of 1,000 to 2,000 new claims per month. Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 Cardozo L. Rev. 1819, 1861 (1992). More recent data shows that over 90,000 new asbestos lawsuits were filed last year, representing an increase of one third from the previous year. Testimony of the Honorable Benjamin Nelson before the United States Senate Committee on the Judiciary-Asbestos Litigation, Sept. 25, 2002; Greenhouse, *Asbestos Appeal Centers on Fear of Cancer*, N.Y. Times, Nov. 7, 2002, at C18, col. 4.

bankruptcies of once-solvent corporate entities. Currently, there are more than 60 bankruptcy cases pending in the United States that have been filed by once healthy corporations as a direct result of the magnitude of asbestos lawsuits. *See* Glater, *Defending a United Detroit on Asbestos*, N.Y. TIMES, Nov. 3, 2002, at sec. 3, col. 1; Roston, *The Asbestos Pit: An Old Issue is Back and the Lawsuits are Killing Shares*, TIME, Mar. 11, 2002. These numbers continue to grow as a result of the continuing stream of asbestos cases. Indeed, in the first seven months of 2002, 12 companies facing significant asbestos liability sought protection under the Bankruptcy Code — more than in any other three year period before 1999. Testimony of the Honorable Benjamin Nelson, United States Senate Committee on the Judiciary-Asbestos Litigation, Sept. 25, 2002. The debtors' filings in many of these cases starkly illustrate the fact that the recent and dramatic influx of claims has left those companies with no other feasible way to resolve their alleged asbestos liability other than seeking protection under the Bankruptcy Code.[5]

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5. *See* Affidavit of David Weinberg, filed in *In re G-I Holdings, Inc.*, Case No. 00-30135 (D.N.J. 2000), sworn to on January 4, 2001 at ¶¶ 7-9:

> [F]aced with a continuous stream of asbestos claims primarily from individuals who show no asbestos-related impairment, and the recent bankruptcy filings of four other major asbestos defendants, G-I has been forced to succumb to the financial pressure surrounding it and seeks protection from its creditors under chapter 11 of the Bankruptcy Code.

See also Affidavit of David Segal, filed in *In re W.R. Grace & Co., et al.*, Case No. 01-01139 (D. Del. 2001), sworn to on April 2, 2001 at ¶¶ 23-25; Affidavit of William Rodruan, filed in *In re Armstrong World Industries, Inc., et al.*, Case No. 00-4471 (D. Del. 2000), sworn to on Dec. 5, 2000 at ¶ 34 ("in the absence of legislation addressing

(Cont'd)

Centralization of claims contemplated by sections 1334(b) and 157(b)(5) provides an avenue to address many of these problems arising from the recent explosion of asbestos litigation. The crippling costs associated with having to litigate essentially the same asbestos case thousands of times in different courts could be eliminated, and procedures could be established to streamline the litigation of common factual and legal issues. Centralization ultimately will benefit the true asbestos victims by preserving the resources of the defendants for the benefit of asbestos claimants with real and enforceable claims. The Fourth Circuit aptly described the concerns to the claimants of not centralizing mass litigation in one forum:

> If the claimants as a whole are to realize reasonable compensation for their claims, it is obviously in the interest of the class of claimants as a whole to obviate the tremendous expense of trying these cases separately. If the bankruptcy court could arrive at a fair estimation of the value of all the claims and

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(Cont'd)

the challenges faced by asbestos defendants, the chapter 11 process is the only means of fully and finally addressing the merits of the asserted asbestos-related claims. . . ."); Debtors' Motion to Fix Proof of Claim Bar Date and Approving Bar Date Notice Procedures, filed in *In re United States Mineral Products Co.*, Case No. 01-2471 (D. Del. 2001), dated Aug. 1, 2002 at ¶¶ 6-9 (in the year prior to the chapter 11 filing date, the number of claims and the aggregate damages sought, as well as the chapter 11 filing by other co-defendants, strained the debtors' resources "to the point where chapter 11 protection became necessary"); Affidavit of Richard Fleming, filed in *In re USG Corp.*, Case No. 01-2094 (D. Del. 2001), sworn to on June 27, 2001 at ¶ 7 ("these cases have been precipitated by the skyrocketing demands of asbestos plaintiffs in approximately 100,000 pending claims of such plaintiffs against U.S. Gypsum, one of USG's main subsidiaries.").

> submit a fair plan of reorganization based on such estimation, with some mechanism for dispute resolution and acceptable to all interested parties, great benefit to all the claimants could be achieved and the excessive expense of innumerable trials, stretching over an interminable time, could be avoided.

A.H. Robins Co., 788 F.2d at 1013.

In the final analysis, the ability to centralize mass tort actions in one forum provides a unique opportunity to efficiently resolve these cases on a global scale. As the authors of the *Manual For Complex Litigation* (Third) § 31.132 (1995), have recognized, one of the great advantages of consolidating cases through procedures such as federal multidistrict litigation pursuant to 28 U.S.C. § 1407 is that "they bring before a single judge all the cases, parties and counsel comprising the litigation. They therefore afford a unique opportunity for a negotiation for a global settlement." However, because federal multidistrict litigation does not include cases in state court, its effect is blunted where, as here, most of the related cases are pending in state forums. The reach of federal "related to" jurisdiction and the ability to transfer state court actions pursuant to section 157(b)(5) provide a unique remedy for this defect, and have been aptly described by the *Manual* as "[t]he most powerful device for aggregating multiple litigation pending in federal and state courts." *Id.* at 283.

The authority of the Judicial Panel on Multidistrict Litigation to centralize all cases pending in the federal courts reflects a strong and important policy favoring centralization of all cases that are within the jurisdiction of the federal courts. The reach of "related to" jurisdiction under section 1334(b) to claims pending in both federal and state courts reflects the same strong and important policy of centralizing all cases that fall within federal bankruptcy jurisdiction. The authority to

centralize under sections 1334(b) and 157(b)(5) is a tool to facilitate an orderly, efficient resolution of all claims related to a bankruptcy case. Centralization gives the parties the opportunity to arrive at a goal all can agree on: coordinated, efficient and less expensive resolution of claims against the Debtor, the petitioners and other codefendants who have been alleged to be jointly and severally liable to the plaintiffs. *Amicus* submits that, through centralization, common key factual and legal issues may be resolved in a single forum and that it will be possible to develop a fair adjudication process that maximizes both the possibility of a successful reorganization of the Debtor and the fair treatment of all allowed claims. Ultimately, that process is critical to the Debtor's reorganization.

The Third Circuit below failed to consider these issues when it severely limited the reach of federal "related to" jurisdiction by imposing the "automatic effect" requirement. In so doing, the Third Circuit closed the door to the only avenue available to federal courts to centralize, and ultimately, seek to control the asbestos litigation problem.

CONCLUSION

For all of the foregoing reasons, the *amicus* urges the Court to exercise its discretion to grant the petition for *writ of certiorari*.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

IN RE FEDERAL-MOGUL GLOBAL, INC.

DAIMLERCHRYSLER CORPORATION,
FORD MOTOR COMPANY, AND
GENERAL MOTORS CORPORATION,

Petitioners,

v.

OFFICIAL COMMITTEE OF ASBESTOS CLAIMANTS OF
FEDERAL-MOGUL GLOBAL, INC., ET AL.

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY TO BRIEF IN OPPOSITION

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I. The Third Circuit Erred, And Created A Circuit Conflict, By Holding That The Denial Of A Transfer Motion Under 28 U.S.C. § 157(b)(5) Is Not Appealable.

The motions that were actually decided by the district court below, in the decision over which the Third Circuit held that it lacked appellate jurisdiction, were petitioners' "motions to *transfer* the Friction Products Claims." Pet. App. 56a (emphasis added). Under the Sixth Circuit's decision in *In re Dow Corning Corp.*, 86 F.3d 482 (6th Cir. 1996), an order denying such motions is appealable as both a "final" and a "collateral" order. *See id.* at 487-88. The district court below, however, attempted to insulate its decision from review by also purporting (in the very same order denying the motions to transfer) to "remand" these claims directly to the state courts from which they had been removed, thereby allowing respondents to argue that the order was unreviewable as a remand order. And that is precisely what respondents did argue in the Third Circuit, and argue again here.

The Third Circuit, however, did not accept respondents' characterization of the district court's order as a remand order. Rather, the Third Circuit held that the district court's order was unappealable *when construed as the denial of a transfer motion under 28 U.S.C. § 157(b)(5)*. *See* Pet. App. 19a-20a. That holding is not only manifestly incorrect, but also flatly inconsistent with the Sixth Circuit's holding in *Dow Corning*. *See* 86 F.3d at 487-88.

Respondents do not even attempt to defend the Third Circuit's holding on the merits. That is not surprising, because it is well-established (or was, until the ruling below) that a relaxed standard of finality applies in bankruptcy cases, where orders are "final" (and hence appealable) where "they finally dispose of *discrete disputes within the larger case*." *In re Saco Local Dev. Corp.*, 711 F.2d 441, 444 (1st Cir. 1983) (Breyer, J.) (emphasis in original). As the Sixth Circuit recognized in *Dow Corning*, the denial of a transfer motion under Section 157(b)(5) easily meets this standard: whether claims against nondebtors are "related to" a

particular bankruptcy is a discrete question separate from the claims at issue in the underlying bankruptcy, and would be "effectively unreviewable" by appeal years later upon confirmation of the debtor's final plan of reorganization. 86 F.3d at 487-88. Indeed, for just this reason, the *Dow Corning* court held that the denial of a transfer motion under Section 157(b)(5) is appealable as *both* a "final" judgment *and* a "collateral" order. *See id.*; *see also A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1009 (4th Cir. 1986) (holding that the grant or denial of a Section 157(b)(5) transfer motion is appealable as both a final and a collateral order).

While respondents conspicuously do *not* defend the decision below on the merits, they *do* deny the existence of a circuit split on this issue. *See* Opp. 21-23 & n.6. According to respondents, the Sixth Circuit's decision in *Dow Corning* (and the Fourth Circuit's decision in *A.H. Robins* on which it relied) are distinguishable from this case because the district courts in those cases had not also entered orders "remanding the claims at issue to the state courts." *Id.* at 21; *see also id.* at 23 n.6. But here respondents are simply quarreling with the Third Circuit's decision that the district court's order was unappealable *when construed as the denial of a transfer motion.* Pet. App. 19a-20a. Petitioners may *wish* the Third Circuit had held that the denial of a transfer motion is unappealable when coupled with a remand order, but that is not what the Third Circuit did. *See id.* Under the decision below, the law in the Third Circuit is that orders denying transfer motions under Section 157(b)(5) are unappealable, *see id.*, while the law in the Sixth Circuit is precisely the opposite, *see* 86 F.3d at 487-88. If that is not a circuit split, it is hard to know what is.

Indeed, as respondents themselves implicitly acknowledge, *see* Opp. 18-19, it is wholly illogical to couple the denial of a transfer motion with a remand order, because those dispositions are inherently inconsistent and mutually exclusive. An order denying a transfer motion sends the

claims back to the *federal* courts to which they were removed (and from which they were provisionally transferred), whereas a remand order sends the claims back to the *state* courts from which they were removed. A single order cannot logically send the same claims back to both fora at once. For the district court to deny the transfer motions *after* remanding the claims, as respondents suggest, *id.* at 19, would have been a meaningless act, because the court would have had before it *no* claims to send back to the federal courts from which they had been provisionally transferred.

It is not surprising, thus, that the Third Circuit took the district court at its word and reviewed the challenged order *both* as the denial of a transfer motion *and* as a remand order, *see* Pet. App. 19a, and held that it was unappealable as *either*, *see id.* at 19a-20a, 31a-36a. Those are not alternative holdings: each one is logically necessary to the Third Circuit's judgment dismissing petitioners' appeals for lack of jurisdiction. Because the Court of Appeals declined to characterize the challenged order, it could not have dismissed petitioners' appeals from that order without holding that it lacked jurisdiction *both* over the denial of a Section 157(b)(5) transfer motion *and* over a cross-jurisdictional remand order. Accordingly, both of those holdings are squarely and properly presently here, regardless of the validity of the Court of Appeals' alternative assumptions underlying those holdings. *See, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) ("The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions."); *Briscoe v. LaHue*, 460 U.S. 325, 328 n.3 (1983) ("Because we granted certiorari to review the Court of Appeals' holding, we make the same assumptions for purposes of deciding this case, without implying that they are valid."). Respondents cannot insulate the Third Circuit's holding on the appealability of Section 157(b)(5) transfer orders from this Court's review by simply challenging the validity of the assumption underlying that holding.

Contrary to respondents' assertion, thus, it is simply not true that "[a]t the appellate level, the issue of 'transfer' was completely irrelevant . . . [and] no longer presented a justiciable case or controversy." Opp. 18. Petitioners challenged (and continue to challenge) the district court's denial of their transfer motions, and respondents defended (and continue to defend) that denial. The Third Circuit specifically and expressly held that the district court's order, when construed as the denial of a transfer motion under 28 U.S.C. § 157(b)(5), is not appealable, Pet. App. 19a-20a, and that holding squarely conflicts with the Sixth Circuit's contrary holding in *Dow Corning*, 86 F.3d at 487-88. This Court's review is warranted to correct the Third Circuit's error, and resolve the resulting circuit conflict.

II. The Third Circuit Erred, And Created A Circuit Conflict, By Holding That A Cross-Jurisdictional Remand Is Not Appealable.

The Third Circuit also held that, when construed as a remand order, the district court's order was *again* unappealable, notwithstanding the fact that the district court purported to "remand" claims that had been removed to *other* federal courts and then transferred. Pet. App. 31a-36a. Because any such remand was unauthorized by the bankruptcy remand statute—which specifically limits the remand power to "[t]he court to which such claim or cause of action is removed," 28 U.S.C. § 1452(b)—the Third Circuit thereby erred. *See, e.g., Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 351 (1976). And that error created not one but two circuit splits: one on whether remands based on an asserted lack of subject-matter jurisdiction are unappealable even if *otherwise* beyond the district court's statutory authority, *see* Pet. 18-21, and the other on whether a court other than "[t]he court to which [a bankruptcy claim] is removed" has the statutory authority to remand such a claim, *see id.* at 21-24.

Respondents contend in a footnote that the first of those splits is not implicated here because "[n]othing in the court of appeals' discussion suggests" a holding that remands based on lack of subject-matter jurisdiction are unappealable even if *otherwise* beyond the district court's statutory authority. Opp. 17 n.4. That contention is mystifying, because the Third Circuit could scarcely have been any more explicit on this score. The Third Circuit expressly rejected petitioners' argument that the district court's order was appealable under *Thermtron* by holding that *Thermtron* (as allegedly "clarified" by *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127-28 (1995)) simply did not apply to remand orders based on lack of subject-matter jurisdiction. Pet. App. 34a. According to the Third Circuit, "[a]s the basis for the District Court's remand in this case was lack of subject matter jurisdiction (the absence of 'related to' jurisdiction), *appeal is . . . barred*." *Id.* (emphasis added). Respondents may be unwilling to defend that holding, but they cannot simply deny its existence. And it is telling that respondents do not deny that at least four other circuits have held that *Thermtron* and *Things Remembered* authorize appellate jurisdiction over remand orders based on lack of subject-matter jurisdiction where a district court *otherwise* exceeds its statutory authority. *See* Pet. 19-21. Because those holdings conflict with the decision below, *see* Pet. App. 34a, this Court's review is warranted.

Respondents also attempt to deny a circuit split on the validity of direct cross-jurisdictional remands under the bankruptcy remand statute, 28 U.S.C. § 1452(b), by asserting that this statute "has no bearing here" at all. Opp. 15. According to respondents, the remands in this case are governed exclusively by the *general* remand statute, 28 U.S.C. § 1447(c), even though the claims in this case were removed from state to federal court under the *bankruptcy* removal statute, 28 U.S.C. § 1452(a), as "related to" the Federal-Mogul bankruptcy within the meaning of the *bankruptcy* jurisdictional statute, 28 U.S.C. § 1334(b).

Needless to say, respondents turn the law upside down by asserting that the *bankruptcy* remand statute is wholly irrelevant to *bankruptcy* remands.

Respondents purport to base that extraordinary assertion on this Court's decision in *Things Remembered,* but that reliance is misplaced. *Things Remembered* held only that courts must apply both the general remand statute and the bankruptcy remand statute where both provisions can "comfortably coexist," 516 U.S. at 129 (citing *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992))—as in that case, where both provisions precluded review of a remand order, and there was no asserted inconsistency between them. That holding is based on the venerable principle that courts are required to reconcile the various provisions of the U.S. Code whenever possible. *See, e.g., Germain*, 503 U.S. at 253. But respondents turn that principle on its head by asking this Court to *ignore* the specific language of the bankruptcy remand statute, 28 U.S.C. § 1452(b), in evaluating the validity of a bankruptcy remand. *Things Remembered* does not remotely authorize courts to use the general remand provision to override the bankruptcy remand provision where (as here) the provisions differ. The specific may not always trump the general, but the general certainly does not trump the specific.

Thus, respondents miss the point by focusing exclusively on the general remand statute, and acting as if the bankruptcy remand statute did not exist. Regardless of whether the general remand statute authorizes a remand by a court other than the court to which a claim was removed, the bankruptcy remand statute plainly does not. The claims in this case were removed from state courts across the Nation to the local federal courts, and then provisionally transferred to the federal court in Delaware. The latter court, therefore, was not "[t]he court to which such claim or cause of action [was] removed," 28 U.S.C. § 1452(b), and therefore was not authorized to remand the claims.

That, in fact, is precisely the holding of the Ninth Circuit in *Hudson-Ram L.P. v. Archer,* 210 F.3d 387, 2000 WL 14398 (9th Cir. Jan. 7, 2000) (unpublished). Respondents do not contest this point, but instead deny the existence of a conflict on the ground that "[t]he remand order in that case was entered under § 1452(b)," rather than § 1447(c). Opp. 16. That argument makes no sense. If, as defendants argue, Section 1447(c) trumps Section 1452(b) even with respect to claims removed under the bankruptcy removal statute, then *Hudson-Ram* was incorrectly decided. *Hudson-Ram* is indistinguishable from this case: there, as here, claims were removed from state to federal court under the bankruptcy removal statute, and then transferred to another federal court, which purported to remand them directly to the original state court. 2000 WL 14398, at *1. The Ninth Circuit held that it could review the case because "this was not a proper 'remand,'" *id.*; the Third Circuit held the opposite, *see* Pet. App. 34a-36a. Again, if this is not a circuit split, it is hard to know what is.

In the alternative, petitioners argue that the Ninth Circuit's decision in *Hudson-Ram* "could not create a 'conflict' requiring resolution by this Court" because it is unpublished. Opp. 16. Respondents cite no authority for that proposition, which is not surprising because none exists. To the contrary, this Court frequently reviews unpublished decisions of the Courts of Appeals, *including* the Ninth Circuit. *See, e.g., Cooper Indus., Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424, 430 (2001) (reviewing *Leatherman Tool Group, Inc. v. Cooper Indus., Inc.*, 1999 WL 1216844 (9th Cir. Dec. 17, 1999) (unpublished)); *Clark Cty. Sch. Dist. v. Breeden,* 532 U.S. 268, 269 (2001) (*per curiam*) (reviewing *Breeden v. Clark Cty. Sch. Dist.,* 2000 WL 991821 (9th Cir. July 19, 2000) (unpublished)); *Behrens v. Pelletier,* 516 U.S. 299, 305 (1996) (reviewing *Pelletier v. Federal Home Loan Bank of San Francisco*, No. 94-56507 (9th Cir. Nov. 17, 1994) (unpublished)); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 452 (1993) (reviewing

McQuillan v. Sorbothane, Inc., 1990 WL 92599 (9th Cir. July 3, 1990) (unpublished)); *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 354 (1991) (reviewing *Catalan v. Paulson Inv. Co.*, No. 88-4099 (9th Cir. Feb. 5, 1990) (unpublished)); *Portland Golf Club v. CIR*, 497 U.S. 154, 159 (1990) (reviewing *Portland Golf Club v. CIR*, 1989 WL 61765 (9th Cir. June 1, 1989) (unpublished)); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 314 (1988) (reviewing *Martinez v. Oakland Scavenger Co.*, No. 85-2903 (9th Cir. Dec. 11, 1986) (unpublished)). Indeed, were the law otherwise, a court of appeals could insulate its decision from this Court's review by simply declining to publish it. The fact that the Ninth Circuit chose not to publish its decision in *Hudson-Ram* (presumably because the statutory language on which that decision is based is so straightforward) provides no basis for declining to review the conflict between that decision and the decision below.

III. This Case Presents Issues Of Signal Importance.

The welter of circuit splits described above underscores how desperately this Court's guidance is needed in this area of the law, but should not deflect attention from the signal importance of this particular case in its own right. This case presents the question whether the American judiciary can address "mass tort" claims—particularly asbestos claims—in a fair and rational way. Right now, that is not the case: as the Third Circuit noted more than six years ago,

> The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.

Georgine v. Amchem Prods., Inc., 83 F.3d 610, 619 (3d Cir. 1996), *aff'd*, 521 U.S. 591 (1997). Since then, the problem

has only worsened, as the onslaught of asbestos claims has engulfed not only asbestos manufacturers, but also "Main Street" American businesses, including petitioners.

Respondents try to downplay the importance of this case by arguing that global *Daubert* hearings on the scientific validity of the friction product claims "can be conducted, if the courts deem them useful, without petitioners' being present" in particular bankruptcy proceedings. Opp. 23. That argument makes no sense. Congress granted the federal bankruptcy courts "comprehensive jurisdiction" precisely so that they "might deal efficiently and expeditiously with all matters connected with the bankruptcy estate." *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995) (internal quotation omitted). To conduct *Daubert* hearings with respect to claims against the debtor, but not against parties (like petitioners) with enormous contingent indemnification and/or contribution claims against the debtor, would turn the law upside down, because it would leave the bankruptcy estate open to substantial additional liability.

That is precisely why the Sixth Circuit recognized in *Dow Corning* that personal injury claims against nondebtors based on products manufactured by the debtor are necessarily "related to" the bankruptcy within the meaning of 28 U.S.C. § 1334(b). 86 F.3d at 488-94. As that court explained,

> The claims currently pending against the nondebtors give rise to contingent claims against [the debtor] which unquestionably could ripen into fixed claims. The potential for [the debtor]'s being held liable to the nondebtors in claims for contribution and indemnification, or vice versa, suffices to establish a conceivable impact on the estate in bankruptcy. Claims for indemnification and contribution, whether asserted against or by [the debtor], obviously would affect the size of the estate and the length of time the bankruptcy proceedings will be pending, as well as

> [the debtor]'s ability to resolve its liabilities and proceed with reorganization.

Dow Corning, 86 F.3d at 494. The district court below recognized that its holding denying "related to" jurisdiction over the claims in this case was probably "impossible to reconcile" with *Dow Corning*, which "came to the opposite conclusion on a remarkably similar set of facts," but opined that the Sixth Circuit was "wrong." Pet. App. 68a.

The Third Circuit acknowledged the conflict between the district court's ruling in this case and the Sixth Circuit's ruling in *Dow Corning*, Pet. App. 28a-29a, but held that "[w]e . . . remain a step away from reaching the merits of whether the District Court has 'related to' jurisdiction" because appellate jurisdiction was lacking, *id.* at 30a. Accordingly, the Third Circuit held only that petitioners "have not met th[e] rigorous standard for the issuance of the extraordinary writ of mandamus as to the District Court's denial of the motion to transfer," *id.*, thereby avoiding the critically important question whether "related to" bankruptcy jurisdiction extends to claims against nondebtors based on products manufactured by the debtor.

In avoiding that question, however, the Third Circuit seriously distorted basic principles of appellate jurisdiction, and effectively gave district courts a roadmap for evading appellate review of decisions involving bankruptcy jurisdiction. This Court's review is thus warranted not only to resolve the welter of circuit splits described above, but to prevent the vital underlying issues of bankruptcy jurisdiction presented here from being wholly insulated from appellate review.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of *certiorari*.

Respectfully submitted,

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No. 02-661

In The
Supreme Court of the United States
October Term, 2002

In Re Federal-Mogul Global, Inc.

BMW North America, Inc., British Motor Cars Distributors, Inc., Harley-Davidson Motor Company Group, Inc., Hennessy Industries, Inc., International Truck and Engine Corporation, MG Rover Group, Inc., Mercedes-Benz USA, LLC, Nissan North America, Inc., Volkswagen of America, Inc., Volkswagen AG, and Volvo Cars North America, Inc., ("International Auto Companies"),

Respondents.

On Petition for Writ of Certiorari to the United States of Court of Appeals for the Third Circuit

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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RULE 29.6 STATEMENT

Pursuant to Rule 29.6, respondents hereby state as follows:

All shares of BMW North America, LLC are held in BMW (U.S.) Holding Corporation. BMW (U.S.) Holding Corporation is owned by Bayerische Motoren Werke Aktiengesellschaft, a German entity.

British Motor Cars Distributors, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

Harley-Davidson Motor Company Group, Inc. is wholly owned by H-D Michigan, Inc. which is wholly owned by Harley-Davidson, Inc.

Hennessy Industries, Inc. is wholly owned by Danaher Corporation.

International Truck and Engine Corporation is a wholly owned subsidiary of Navistar International Corporation.

MG Rover Group, Inc. is ultimately owned by MG Rover Holdings, Limited, which is a privately held entity.

Mercedes-Benz USA, LLC is wholly owned by Daimler-Chrysler North America Holding Corporation, which in turn is wholly owned by DaimlerChrysler AG.

Nissan North America, Inc. is a wholly owned subsidiary of Nissan Motor Company, Ltd.

Volkswagen of America, Inc. is a subsidiary of Volkswagen Beteiligungs-Gesellschaft mbh, which is wholly owned by Volkswagen AG.

Volkswagen AG has no parent corporation and no publicly held company owns 10% or more of its stock.

Volvo Cars North America, Inc. is a privately held company. It is a subsidiary of Volvo Car Corporation which is a subsidiary of Ford Motor Company.

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INTRODUCTION

The International Auto Companies[1] support the Petition for Writ of Certiorari filed by DaimlerChrysler Corporation, Ford Motor Company and General Motors Corporation (the "Domestic Auto Companies"). Like the Domestic Auto Companies, the International Auto Companies could be engulfed by the tidal wave of asbestos litigation. That wave has not only swept away those manufacturers of amphibole-containing asbestos products that can cause disease, but has also threatened to drown even those companies that have merely incorporated chrysotile-containing asbestos components, manufactured by others, into their products. Federal-Mogul Global, Inc. is among the most recent victims and the Domestic and International Auto Companies are targeted as well. That threat is not merely on the horizon for the Domestic and International Auto Companies, their employees and their shareholders - it has arrived.

This case presents an opportunity to confront this looming disaster head-on: not through mass settlements or devices that this Court has determined to be legally unavailable. *See e.g. Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) and *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). Rather, the courts below were asked only to apply jurisdictional and procedural rules that are well-established and congressionally-mandated to achieve an orderly and just resolution of thousands of fundamentally flawed claims. The

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[1] "International Auto Companies" is the informal designation given to a group of companies that share common positions in this matter. All of these entities are organized under American law, except for MG Rover Group, Inc. and Volkswagen AG. The International Auto Companies consist of BMW North America, Inc., British Motor Cars Distributors, Inc., Harley-Davidson Motor Company Group, Inc., Hennessy Industries, Inc., International Truck and Engine Corporation, MG Rover Group, Inc., Mercedes-Benz USA, LLC, Nissan North America, Inc., Volkswagen of America, Inc., Volkswagen AG, and Volvo Cars North America, Inc.

district court, however, misapplied those provisions and frustrated not only the attempt to dispose of the claims at issue on the merits, but also appellate review of that misapplication.

The Third Circuit's refusal to review the district court's decision sets it apart from its sister courts of appeals and has created a conflict among the circuits. Moreover, the Third Circuit's determination is simply erroneous. Therefore, the International Auto Companies respectfully submit that the petition for certiorari should be granted so that this Court may resolve the circuit conflict and allow this matter to be adjudicated on its merits.

A favorable resolution of this circuit split would return this case to the Third Circuit to address whether the thousands of asbestos claims removed to federal court and provisionally transferred to the District of Delaware are related to the Federal-Mogul bankruptcy. If the Third Circuit determines that these claims are related and orders them transferred to the Federal-Mogul bankruptcy, the bankruptcy court can convene an omnibus proceeding to determine whether asbestos plaintiffs can present admissible expert testimony that friction products can cause asbestos-related disease. *See, Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). By finding no reliable evidence to support causation, that *Daubert* determination would effectively resolve a substantial segment of the so-far uncontrolled tidal wave of litigation involving friction products that otherwise threatens an entire industry.

STATEMENT OF THE CASE

The International Auto Companies adopt the Statement of the Case contained in the Petition for Writ of Certiorari filed by the Domestic Auto Companies.

The International Auto Companies find themselves in the same position as the Domestic Auto Companies and Federal-Mogul Global, Inc., the debtor in the Chapter 11 proceedings below. All have been hit by a tidal wave of lawsuits claiming

that benign, nonfriable friction products which were incorporated into the products they made or sold years ago have caused injury. Since the medical and scientific communities have definitively determined that friction products do not cause asbestos-related disease, those claims are wholly without merit. Nevertheless, the cost of defending those claims coupled with the innate uncertainty of litigation have struck and will continue to strike blows to these companies.

After the Federal-Mogul bankruptcy filing in October 2001, the International Auto Companies, like the Domestic Auto Companies, removed asbestos-related cases from state court to federal court under the bankruptcy removal statute, 28 U.S.C. § 1452(a). Pursuant to the bankruptcy court's broad "related to" jurisdiction, those cases were then provisionally transferred to the Federal-Mogul bankruptcy pending in the District of Delaware. After the district court denied the motions for a permanent transfer, the International Auto Companies joined the Domestic Auto Companies in an appeal to the Third Circuit. After the Third Circuit denied the appeal, the International Auto Companies joined in an unsuccessful emergency motion to recall the mandate to allow the entry of a stay and an unsuccessful application to this Court for an emergency stay.

The International Auto Companies respectfully submit this brief in support of the petition for certiorari filed by the Domestic Auto Companies.

REASONS FOR GRANTING THE WRIT

I. THE SUBSTANTIVE ISSUES PRESENTED TO THE COURTS BELOW ARE OF CRITICAL AND FUNDAMENTAL IMPORTANCE.

The importance of the proceedings below cannot be overstated. At stake is the ability of an entire industry to defend itself from the onslaught of groundless mass litigation supported only by junk science. Since the defense of this litigation alone - irrespective of any awards that may result – threatens to distort the American judicial system into an elephantine threat to the American economy, a means of resolving those claims in omnibus fashion within the framework of existing statutory schemes must be afforded close and considered evaluation. Moreover, that framework will have an immediate material impact upon the debtor's estate, its administration and the claim resolution process.

This Court's reluctance to impose novel limitations upon the destructive and seemingly immortal American asbestos litigation without express legislative authority has been consistent and longstanding. *See, Ortiz, supra* and *Amchem, supra*. The Federal-Mogul bankruptcy, however, presents the Court with a unique opportunity to employ congressionally-mandated means to begin the process of bringing order to this chaotic mass tort dilemma. The friction product claims against the Domestic and International Auto Companies are directly related to the Federal-Mogul bankruptcy. These claims should be resolved in the context of that bankruptcy pursuant to 28 U.S.C. § 1334(b), because they will necessarily affect the size and administration of the bankruptcy estate and the development of a confirmable plan of reorganization.

Thus, the district court should have granted the Domestic and International Auto Companies' motions to transfer the friction product claims to the Federal-Mogul bankruptcy. Indeed, it is the very essence of the federal judiciary's Constitutional duty to administer justice efficiently, in a manner

fair to all litigants and through the use of all the tools and procedure provided by Congress and the Constitution.

Once those claims are transferred to the Federal-Mogul bankruptcy, that court can efficiently conduct a *Daubert* hearing on whether sound, scientific evidence supports the allegation that friction products can cause disease. This simple, cost-effective and orderly plan for resolving tens of thousands of asbestos claims in a matter of months has no equal. In fact, no alternative plan has ever been proposed - except the shamefully wasteful and inequitable war of attrition that has already resulted in dozens of unsuccessful asbestos-related Chapter 11 proceedings. Upon the bankruptcy court's recognition that there is insufficient scientific evidence that friction products can cause disease, thousands of asbestos claims will be dismissed and cleared from the court's docket.

The single *Daubert* hearing on this issue will be conducted quickly and at limited expense. In contrast to the present chaos and injustice, this arrangement will provide a faster and far more efficient means of resolving tens of thousands of claims than is possible in any other jurisdiction. Far from delaying the claim-handling process, this procedure will resolve thousands of claims in a matter of months. No state court in the nation has the ability to accomplish such a feat.

The district court rejected the argument that these thousands of claims are related to the Federal-Mogul bankruptcy because it portended only chaos. However, this careful and well-considered vision is the solution. The solution is premised upon exhaustive scientific and medical research which has established one unmistakable truth: automotive friction products are not capable of causing asbestos-related disease. Forcing Federal-Mogul to litigate that issue in the Delaware bankruptcy court, while making the Domestic and International Auto Companies continually litigate the identical issue in hundreds of courtrooms across the country only widens the tidal wave's path of destruction. Establishing the invalidity of plaintiffs' claims in one forum where every party, including future claimants, is

already present and represented by counsel constitutes a quantum leap forward in the sound and just administration of asbestos litigation -- an opportunity that should not be lost.

Where science, medicine, sound judicial management, authoritative case law, the United States Code and the Federal Rules of Evidence unite to create an opportunity to solve a substantial portion of the asbestos crisis, fear of the unknown is not an acceptable escape. The district court's refusal to exercise its congressionally-mandated jurisdiction over tens of thousands of claims inextricably interwoven with the Federal-Mogul bankruptcy was based on an unarticulated fear of "looming chaos." In refusing to do anything, however, the district court embraced the very chaos that afflicts the American judicial system.

The momentous substantive issue of whether the thousands of asbestos claims against the Domestic and International Auto Companies are related to the Federal-Mogul bankruptcy should not be dismissed without appellate review.

II. THE THIRD CIRCUIT ERRED IN REFUSING TO EXERCISE APPELLATE JURISDICTION.

The Third Circuit failed to seize the day. It had appellate jurisdiction to review the district court's order, but failed to recognize that fact. The district court's order should receive appellate review so that the issue of whether thousands of asbestos claims are related to the Federal-Mogul bankruptcy can be decided on its merits.

A. The District Court's Order Denying Transfer of the Friction Product Claims is Subject to Appellate Review.

As the Domestic Auto Companies articulated in their Petition for Writ of Certiorari, the Fourth and Sixth Circuits have held that an order granting or denying a motion to transfer in a bankruptcy matter is appealable as both a final and collateral

order. *See In re Dow Corning Corporation*, 86 F.3d 482 (6th Cir. 1996) and *A.H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir. 1986) *cert. denied*, 479 U.S. 876 (1986). In the face of this highly persuasive precedent in virtually identical factual settings, the Third Circuit erroneously ruled that it could not review the district court's transfer order. That error effectively deprived the Domestic and International Auto Companies' right ever to obtain meaningful appellate review of these crucial issues. Because the Third Circuit's decision is in sharp contradistinction to the law adopted by the Fourth and Sixth Circuits, certiorari is warranted.

B. The District Court's Order Remanding the Provisionally Transferred Friction Product Claims Directly to the State Courts From Which They Were Removed is Subject to Appellate Scrutiny.

As the Domestic Auto Companies articulated in their Petition for Writ of Certiorari, an order attempting to remand claims directly to state courts and across jurisdictional lines is appealable. The Third Circuit failed to appreciate that it had the power to review the remand order as beyond the district court's statutory authority. The district court simply ignored the plain statutory framework that governs removal and remand.

The Third Circuit stretched the holding of *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995), to reach this conclusion, which, as the Domestic Auto Companies point out, is inconsistent with a variety of other circuit court decisions. Moreover, the Third Circuit simply ignored the plain statutory language authorizing remand only to "[t]he court to which such claim or cause of action is removed." 28 U.S.C. S 1452(b).

Like the Domestic Auto Companies, the International Auto Companies seek here only the opportunity to present their substantive position on the merits. The Third Circuit improperly denied that opportunity in a published decision that conflicts with numerous other circuit court decisions nationwide. For these reasons, certiorari is warranted.

CONCLUSION

In order to avoid the grave inequity resulting from the Third Circuit's refusal to scrutinize the district court's erroneous order and the far-reaching consequences of that failure, the International Auto Companies respectfully urge this Court to grant the Petition for Certiorari.

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